SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 111

DANIEL CASTANEDA GONZALES, PETITIONER,

VS.

H. R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION OF DISTRICT No. 16, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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1-2 In United States District Court for the Southern District of California, Central Division

No. 14817-BH

DANIEL CASTANEDA GONZALES, PLAINTIFF,

vs.

H. R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION OF DISTRICT NO. 16, JOHN P. MCGRANERY, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS

COMPLAINT—Filed December 8, 1952

Comes now the plaintiff and for a cause of action alleges:

I

That this complaint is filed and this action will be prosecuted pursuant to the provisions of Section 503 of the Nationality Act of 1940 (Section 903 of the United States Code).

II

That this plaintiff now is and since the filing of this complaint has been a resident of the State of California, residing within the Southern District thereof.

III

That the plaintiff was born at Santa Rita in the State of New Mexico, United States of America on the 21st day of July, 1924, and thereby acquired citizenship of the United States of
3 America.

IV

That the defendants John P. McGranery as Attorney General of the United States and the head of the Department of Justice and H. R. Landon, as District Director of the Immigration and Naturalization of District No. 16 have denied to the plaintiff his rights as a Citizen of the United States and have unlawfully imprisoned, detained, confined and restrained him of his liberty and have taken him into custody for the purpose of deportation.

V

That unless restrained by this Honorable Court said defendants will deport the plaintiff to Mexico, a country of which plaintiff has never been a citizen or national.

Wherefore plaintiff respectfully prays that this Honorable Court make an order commanding the defendants and each of them to appear at a time and place to be specified by this Court to show cause why said plaintiff should not be restored to his liberty, and pending the hearing of said Order to Show Cause plaintiff respectfully prays that said defendants be enjoined and restrained from deporting this plaintiff, and for such other and further relief as to this Court may seem meet and just in the premises.

/S/ HARRY WOLPIN,
Attorney for Plaintiff.

4 [File endorsement omitted.]

Duly sworn to by Daniel Castaneda Gonzales jurat omitted in printing.

5 In United States District Court

ANSWER TO PLAINTIFF'S COMPLAINT—Filed February 6, 1953

Comes now the defendants above named, through their attorneys, Walter S. Binns, United States Attorney for the Southern District of California, Clyde C. Downing and Robert K. Grean, Assistants United States Attorney for the Southern District of California, and in answer to plaintiff's complaint herein admit, deny and allege as follows:

I

Defendants neither admit nor deny the allegations contained in Paragraph I of plaintiff's complaint, on the ground that said allegations are conclusions of law.

II

Defendants have no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs II and III of plaintiff's complaint, and on that ground deny each and every allegation therein contained. Defendants further deny that the plaintiff is a citizen of the United States of America.

III

Answering Paragraph IV of plaintiff's complaint, plaintiff alleges that since the filing of plaintiff's complaint defendant James P. McGranery, sued herein as John P. McGranery, has been superseded by Herbert Brownell, Attorney General of the United States, who has heretofore and prior to the filing of this action been substituted as party defendant.

6 Defendants allege that H. R. Landon, as District Director of Immigration and Naturalization Service, is not a proper party defendant in that he is not the head of the Depart-

ment of Justice, but is an employee thereof and is not a proper party under Section 903 of Title 8, United States Code.

Further answering Paragraph IV of plaintiff's complaint, defendants deny that they have unlawfully imprisoned and restrained the plaintiff of his liberty and deny that they have denied to the plaintiff his rights as a citizen of the United States. In connection therewith defendants allege that the plaintiff has been lawfully taken into custody for deportation as an alien.

IV

Answering Paragraph V of plaintiff's complaint, defendants admit their intention to deport the plaintiff to Mexico, but allege that such action will be held in abeyance pending a hearing in the within action.

For a further, separate second and affirmative defense, defendants allege:

I

That the plaintiff remained outside of the jurisdiction of the United States in time of war, to wit: from September 27, 1944 until April 23, 1946, for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

7 For a further, separate and third defense, defendants allege:

I

That the plaintiff's complaint has failed to state a claim upon which relief can be granted.

Wherefore, defendants pray for a judgment dismissing said complaint, denying the relief prayed for therein, and for such other relief as to the Court seems just and proper in the premises.

WALTER S. BINNS,
United States Attorney.
CLYDE C. DOWNING,
Assistant U. S. Attorney
Chief, Civil Division.
/S/ ROBERT K. GREAN,
Assistant U. S. Attorney,
Attorneys for Defendant.

(Affidavit of Service by Mail)
[Filed endorsement omitted.]

8 In United States District Court

STIPULATION RE SUBSTITUTION—Filed February 6, 1953

It is hereby stipulated by and between the respective parties hereto through their attorneys that pursuant to Rule 25(d) of the

Federal Rules of Civil Procedure that Herbert Brownell, Esq., as Attorney General of the United Sattes may be substituted as party defendant in the place and stead of James P. McGranery, sued herein as John P. McGranery.

Dated at Los Angeles, Calif. this 29th day of January, 1953.

/S/ HARRY WOLPIN,
Attorney for the Plaintiff.

WALTER S. BINNS,
CLYDE C. DOWNING AND
ROBERT K. GREAN,
By /S/ ROBERT K. GREAN,
Attorneys for Defendants.

It is so ordered this 6th day of Febr. 1953.

/S/ LEON R. YANKWICH,
Judge of the U. S. District Court.

9 In United States District Court

MINUTES OF THE COURT—Feb. 26, 1953

Los Angeles, Calif.

Present: The Hon. BEN HARRISON, *District Judge.*
Deputy Clerk: M. E. WIRE. Reporter: J. D. AMBROSE.
Counsel for Plaintiff: HARRY WOLPIN.
Counsel for Defendants: ROBERT K. GREAN, Ass't U.S. Att'y.
STANTON T. CHANDLER, Spanish Interpreter. (Withdrawn.)
ARMIDA BAY, Spanish Interpreter. (11:09) AM.

PROCEEDINGS: For trial. At 10 AM Court convenes herein. Both sides answer ready.

DANIEL CASTANEDA GONZALEZ, plaintiff, is called and sworn.

Counsel stipulate to certain facts.

Stanton T. Chandler is sworn and acts as Spanish Interpreter.

Daniel Castaneda Gonzales testifies in his own behalf through said Spanish Interpreter.

Counsel and the Court not being satisfied with said interpreter, he is withdrawn.

At 10:17 A.M. court recesses. At 11:09 AM court reconvenes herein and all being present as before, including plaintiff and counsel for both sides, Court orders trial proceed.

Armida Bay is sworn and acts as Spanish Interpreter.

10 Daniel Castaneda Gonzales, heretofore sworn, resumes the stand and testifies further through said Spanish Interpreter, Armida Bay.

Counsel for the parties hereto stipulates as to the transcripts of the hearings before the Immigration Officers.

At 11:55 AM court recesses to 2 PM. At 2:03 PM court reconvenes herein, and all being present as before, including plaintiff and counsel for both sides, Court orders trial proceed.

Daniel Castaneda Gonzales, heretofore sworn, resumes the stand and testifies further through Armida Bay, Spanish Interpreter.

Pursuant to stipulation of counsel for the parties, Defts' Ex. A is admitted in evidence and so marked. (See file, Case No. 14,669-T Civil, in this Court.)

Both sides rest.

At 2:23 PM Attorney Grean argues to the Court on behalf of defendants.

At 2:38 PM Attorney Wolpin argues to the Court on behalf of plaintiff.

At 2:37 PM the Court makes a statement of its decision, and Court finds in favor of defendants.

Counsel for the parties hereto orally waive findings of fact and conclusions of law. Counsel for defendants is directed to prepare, serve, and present form of judgment for signature.

11 In United States District Court

No. 14817-BH Civil

DANIEL CASTANEDA-GONZALES, PLAINTIFF,

v.

H. R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION OF DISTRICT NO. 16, HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS,

JUDGMENT—entered March 10, 1953

The above entitled matter came on regularly for trial on February 26, 1953, in the above entitled Court, before the Honorable Ben Harrison, Judge presiding, the plaintiff being present in Court and being represented by his attorney, Harry Wolpin, and the defendants by their attorneys, Walter S. Binns, United States Attorney, Clyde C. Downing and Robert K. Grean, Assistants United States Attorney, appearing by Robert K. Grean; and the Court having heard the testimony of the plaintiff spoken in open Court, and the Court having received evidence on behalf of the defendants by stipulation of counsel for the parties hereto, and the Court having considered the pleadings and having heard oral argument of counsel, and being fully advised in the premises; and findings of fact and conclusions of law having been waived by plaintiff, and the Court having ordered judgment for the defendants;

12 Now, Therefore, It Is Ordered, Adjudged and Decreed:

1. That the plaintiff, Daniel Castaneda-Gonzales, is not a citizen of the United States, having expatriated himself under Section 401(j) of the Nationality Act of 1940, as amended, (8

U.S.C.A., 801(j)), by voluntarily remaining outside the jurisdiction of the United States from September 1944 until April 23, 1946, for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

2. That defendants have judgment, dismissing plaintiff's complaint with prejudice.

3. That the defendants have judgment for costs. Costs taxed at $20.00.

Dated this 4*th* day of March, 1953.

(S.) BEN HARRISON,
United States District Judge.

Approved as to form pursuant to Local Rule 7(a), this——— day of March, 1953.

HARRY WOLPIN,
Attorney for Plaintiff.

Received copy of the within Judgment this 9th day of March, 1953.

HARRY WOLPIN,
Attorney for Plaintiff.

Endorsed: Filed Mar. 9, 1953; EDMUND L. SMITH, *Clerk.*

Endorsed: Judgment Docketed and Entered Mar. 10, 1953.

EDMUND L. SMITH, *Clerk* by (S.) C. A. SIMMONS, *Deputy Clerk.*

13 In United States District Court

NOTICE OF APPEAL—Filed April 24, 1953

To the Respondents Above Named and to Walter S. Binns, United States Attorney and Clyde C. Downing and Robert K. Greau, Assistants United States Attorney, Federal Building, Los Angeles, California, Their Attorney:

Please Take Notice that the above named plaintiff hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of the above entitled Court entered on the 10th day of March, 1953, and to the whole thereof.

Dated this 24th day of April, 1953.

(S.) DAVID C. MARCUS,
Attorney for Plaintiff.

(Affidavit of Service by Mail)

(File endorsement omitted.)

14 Designation of Record on Appeal (omitted in printing).

15 Counter-Designation of Record on Appeal—(omitted in printing).

16-18 Orders Extending Time to File Record and Docket Appeal (omitted in printing).

19 Clerk's Certificate to foregoing transcript omitted in printing.

20 In United States District Court

Honorable BEN HARRISON, *Judge Presiding*

[Title omitted]

No. 14817-BH-Civil

REPORTER'S TRANSCRIPT OF PROCEEDINGS—Filed July 17, 1953

APPEARANCES:

For the Plaintiff: HARRY WOLPIN, Esq.
For the Defendants: WALTER S. BINNS, *United States Attorney.*
By ROBERT K. GREAN,
Ass't U.S. Attorney.

21 The COURT: You may proceed.

The CLERK: Daniel Castaneda Gonzales vs. H. R. Landon and others.

Mr. WOLPIN: The plaintiff is ready.

Mr. GREAN: The defendant is ready.

The COURT: You may proceed.

Mr. WOLPIN: Mr. Castaneda Gonzales, will you take the stand, please?

DANIEL CASTANEDA GONZALES, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The CLERK: State your full name.

The WITNESS: Daniel Castaneda Gonzales.

DIRECT EXAMINATION

By Mr. WOLPIN:

Q. May I have your birth certificate?

A. Yes, sir.

The COURT: Is there any dispute but what this man was born, as alleged in the complaint in the United States, Mr. Grean?

Mr. GREAN: No, there is no dispute. We will stipulate that there has been a finding by the Board that he was born in the United States.

22 Mr. WOLPIN: I discussed a stipulation with Mr. Grean and I think we can stipulate to these facts which will considerably shorten the trial, your Honor: That the plaintiff was born in New Mexico on July 21st, 1924; that he was less than two years of age when he was taken by his parents to reside in the Republic of

Mexico. He resided there from that time until April 23rd, 1946 at which time he came to the United States. He registered. He came to the United States and upon an exhibition of his birth certificate was admitted to the United States;

That he was in the United States until sometime in 1947 when he returned to Mexico and the next time he tried to enter the United States at El Paso he was excluded because the Board of Special Inquiry felt that he had lost his citizenship under Section 401-J of the Nationality Act.

The COURT: What was the date he first came in?

Mr. WOLPIN: April 23rd, 1946.

The COURT: And then the second time?

Mr. WOLPIN: The second time was in 1947, I believe. I can get your Honor the date.

The COURT: That is close enough?

Mr. WOLPIN: Is that your stipulation?

Mr. GREAN: Yes, so stipulated.

Q. By Mr. WOLPIN: Mr. Gonzales, you lived in Mexico from 1926 until 1946, is that correct?

23 A. Well, I don't know exactly but I live in the United States until I was about two years old, from 1946——

Q. 1926 to 1946 where did you live?

A. Favela.

Q. Where in Favela?

A. Favela is in the State of Chihuahua.

Q. How far would that be from the American border if you know?

A. About 350 miles or 400.

The COURT:How far from Los Angeles?

The WITNESS: From El Paso, Texas.

Mr. WOLPIN: El Paso is the closest border point.

The COURT: How far from El Paso?

The WITNESS: 350 or 400 miles.

Q. By Mr. WOLPIN: Now, Mr. Gonzales, when did you first—let me ask you this, is your father alive—is your father living?

A. No, sir.

Q. When did your father die?

A. 1935.

Q. You were how old in 1935?

The COURT: That shows for itself, counsel.

Q. By Mr. WOLPIN: When did you first learn that you were an American citizen, Mr. Gonzales?

A. Well, I was about 12 years old when my mother told

24 men that I was born in this country, but I don't know exactly what I have to do at the time, but I find out in 1946 what I have to do.

Q. What did you find out you had to do in 1946?
A. Pardon me?
Q. What did you find out you had to do in 1946?
A. I don't understand very well what that means.
Q. You said you found out what you had to do in 1946.
A. Well, I find when I come to the United States.
Q. Did you ever have a desire to come to the United States before 1946?
A. Well, I don't understand very well but when I first come to the United States——

The COURT: Why didn't you come before?
The WITNESS: Why?
The COURT: Yes.
The WITNESS: Because my mother don't let me.
The COURT: Your wife don't let you?
The WITNESS: My mother.

Q. By Mr. WOLPIN: Will you tell us what happened before you came to the United States in April of 1946?
A. What happened before?
Q. Yes.
A. Well, before—the only thing I do—I come to the American Consul and ask for a card. He gave it to me and——

25 The COURT: I can't understand him. Where is there an interpreter?

Mr. GREAN: I was going to suggest one. I thought from counsel's assurance that the man would be able to understand and answer correctly and consequently we could proceed without an interpreter, but it appears we are going to have to have one for the benefit of the court and the witness—so that we may have a clear picture of what is being asked and answered.

The COURT: I think in fairness to this witness we should have an interpreter.

Mr. WOLPIN: Mr. Chandler of the Immigration and Naturalization Service is present in court and I have had a talk with him and my client and may we use his services in translating?

The COURT: Is he going to be a witness in the case?

Mr. GREAN: No. Mr. Chandler will not be used by the Government as a witness. My only thought or reservation to his use is his ability to speak the language. If the court would like to proceed with Mr. Chandler's aid we will be glad to.

The COURT: I can't test him out as to the extent of his vocabulary.

Mr. GREAN: That is the thing, whether Mr. Chandler's vocabulary is sufficient for him to be able to get along with the witness.

The COURT: Are you satisfied?

26 Mr. WOLPIN: I am satisfied Mr. Chandler is able to get along.

The COURT: He will be sworn as an interpreter, then. You do not feel he is disqualified because he is connected with the Immigration Service?

Mr. WOLPIN: No, I don't feel he is disqualified, your Honor.

(STANTON T. CHANDLER is sworn as an interpreter to translate Spanish into English and English into Spanish.)

The COURT: You may proceed.

Mr. WOLPIN: Does your Honor wish to go back?

The COURT: The last question. I didn't understand his answer.

Q. By Mr. WOLPIN: Mr. Gonzales, will you tell the court what led up to your coming to the United States on April 23rd, 1946?

A. Well, I come to the American Consul.

The COURT: Why did you go to the American Consul?

The WITNESS: Because when I tried to come to the United States those people, they know something better than I and they told me that I have to go to the American Consul and come to the immigration station on the border in El Paso.

The COURT: You had lived down there below the Texas border—below El Paso for a long time?

The WITNESS: Yes.

27 The COURT: Had you grown up down there?

The WITNESS: Yes, sir, I grow up over there, yes.

The COURT: And then why did you want to come back to the United States? Why didn't you stay there?

The WITNESS: Oh, well, because I have to look for the future. Let me tell you. When I grow up there the government places—they told me if I have to do something I have to quit of my citizenship from the United States. I tell her I better come back to the United States than do that.

The COURT: Did you work in Mexico?

The WITNESS: No, sir, I never worked with anybody but my mother. They—then everybody citizen of Mexico—they give the board——

The COURT: This is very unsatisfactory, counsel.

Mr. GREAN: It is not going to work if the interpreter is going to ask questions other than those asked by counsel.

Mr. WOLPIN: Will your Honor instruct the witness to answer the questions in Spanish. He is asked the questions in Spanish and he answers in English. Will you answer the questions, Mr. Castaneda, in Spanish?

By Mr. WOLPIN:

Q. What events led up to your coming to the United States on

pril 23rd, 1946? Did something happen at home, or wherever you ere, 350 or 400 miles from the border that made you come to the nited States?

A. When I became 21 years of age I decided at that time that I should establish my rights as an American to come here to this country as a citizen.

Q. That is correct?

A. Because the small accommodation with my mother wasn't nough room for me.

Mr. GREAN: If the court please, it is very unsatisfactory—this is very unsatisfactory way of proceeding and it is going to be almost impossible to cross examine this witness.

The COURT: Is there an interpreter available?

Mr. GREAN: I would suggest that counsel arrange immediately or an interpreter to be present. If he checks with the clerk of the ourt or would permit someone to call an interpreter through the ffice of the clerk she can probably be here in a very short time.

Mr. WOLPIN: Let me ask you this. Will the Government pay the nterpreter?

The COURT: No.

Mr. GREAN: Of course not.

Mr. WOLPIN: Let me talk to my client.

The COURT: Can't you get an interpreter? The court wants to lispose of this case.

Mr. GREAN: I will help counsel to arrange for an interpreter.

The COURT: Can't you get an interpreter from the Immigration Department who will come down here for an hour or so?

Mr. GREAN: I am informed that they themselves utilize outside interpreters; that they do have interpreters at San Ysidro and various other ports but not here in the central office.

Mr. WOLPIN: My client informs me that he has the funds with vhich to pay for an interpreter so will you arrange for one and may ve have a short recess?

Mr. GREAN: I will arrange that immediataely.

The COURT: Mr. Clerk, can we get one from the county list?

Mr. GREAN: We have a list and Miss Armeda Bey has been found o be satisfactory.

The COURT: Will you find her across the street?

Mr. GREAN: Probably across the street or in the office here in the downtown area. We can check that and have a report back immediately.

The COURT: We will take a recess. There is no use of proceeding this way.

(Short recess.)

The COURT: You may proceed.

(ARMEDA BEY was sworn as interpreter to translate the English language into Spanish and the Spanish language into English.)

The COURT: Will you state your name?

The INTERPRETER: Armeda Bey.

30 The COURT: I wish you would ask this witness to answer in Spanish.

Mr. WOLPIN: I just instructed him to do that, your Honor.

The COURT: So there will not be any confusion.

Mr. WOLPIN: That is just what I told him.

By Mr. WOLPIN:

Q. Mr. Castaneda, did you register for the draft?

A. Where?

Q. In the United States? Did you register for the American Army?

Mr. GREAN: May I admonish counsel, because he understands Spanish, not to interrupt the witness when he is answering. Let the reporter get his answer.

By Mr. WOLPIN:

Q. Where did you register?

A. First time they register for the military service for the United States was in the office of the American Consul in 1946.

Q. Did you receive a classification from the draft board?

A. Yes, I got it here.

Q. How were you registered with the draft board? What was your classification?

A. I-A.

Q. Did you receive a call, a preinduction call to be ex-

31 amined physically?

A. Yes, I did, but when I registered—when I went to Pasadena they told me to wait because they had a new order and then I received a copy from a local board from El Paso that it was not necessary for me to report to the local board until they called me again, but then I didn't receive any other notice.

Q. Did you work for anyone in Mexico?

A. Worked for my mother about 10 years.

Q. Did you have any brothers or sisters?

A. Five, three boys and two girls.

Q. Were they older or younger than you?

A. Younger.

Q. During the time that you were in Mexico prior to April 23rd, 1946, did you help to support your mother and these five brothers and sisters of yours?

A. Yes.

Mr. WOLPIN: You may cross examine, counsel.

The COURT: I have some questions to ask. What kind of work did you do?

The WITNESS: Agricultural.

The COURT: Where did you go to school?

The WITNESS: Right there on the ranch from six years to 10 years. I attended school when I was 10 years old—until I was 10 years old and then my father died and I had to quit school
32 to support my family and no one had to tell me my obligation to any country.

The COURT: What kind of ranch work did you do?

The WITNESS: It wasn't exactly a ranch. It was a ranch in a sort of way. There were several citizens there. They were living there and paying rent to the government and I was helping my mother—working for my mother.

The COURT: What kind of work were you doing?

The WITNESS: Agricultural work, planting and picking corn.

The COURT: Was it cotton or what?

The WITNESS: Corn and beans.

The COURT: How close were you to a town?

The WITNESS: It was a little town there, about 20 kilometers.

The COURT: What newspapers did you read?

The WITNESS: I never read a newspaper until I come to the United States.

The COURT: When did you first know war was on?

The WITNESS: When some of the workers were here working and would go back over there.

The COURT: When did you know the United States was engaged in a war?

The WITNESS: 1946.

The COURT: What?

33 The WITNESS: 1946.

The COURT: That is all.

CROSS EXAMINATION.

By Mr. GREAN:

Q. You stated that you first knew the war was on in 1946. Didn't you know that the war was on before that?

A. No, I did not know it.

Q. I call your attention to a hearing given you before the Immigration and Naturalization Service at El Paso, Texas on October 2nd, 1947.

A. Yes, I remember.

Q. And do you remember that you were asked questions and you gave answers at that time?

A. Yes, I remember.

Q. —call your attention to a question, and I will call your attention to an answer and then I will ask if that question was asked of you and if that was your answer.

"Q. How long have you known that the United States is at war?
"A. Since about 1942."

A. No.
Q. Was that question asked of you and was that your answer?
A. My answer was that I knew that the war—that I knew about the war in 1946 and I also answered that I wanted to come
34 to the United States before but my mother did not permit me to leave the house.
Q. And when did you first desire to come to the United States?
A. When I was——

The COURT: That doesn't answer the question. Did you tell them at that hearing down there that you knew the war was on in 1942?
The WITNESS: I did not tell them.
The COURT: What?
The WITNESS: I did not tell them. I told them in 1946 and they told me it was in 1944. They scared me.
The COURT: What was that last answer?
The WITNESS: I committed an error. I went to say '46 and said '44 and I corrected myself at that time.
Mr. GREAN: What about 1942? Did you say that you knew that the war was on from 1942?

A. No, I didn't say that.

By Mr. GREAN:

Q. And when did you know that it was your duty as an American citizen to register for military duty with the United States?
A. In 1946.

Q. I call your attention to the hearing of October 2nd, 1947 and I will read the question and your answer and I will ask you if that was asked of you and that was your answer.

35 "Q. How long have you known that it was your duty as an American citizen to register for military duty with this country?
"A. Since 1944."

Was that question asked of you and was that your answer?
A. The answer I gave was 1946 but they based the same answer that I gave before.

Q. All right. I will read the next question and your answer:

"Q. Just what did you learn in 1944 about your obligation to this country?

"A. I talked to some individuals who were citizens of the United States living in Mexico and they told me that American citizens living abroad should return to the United States to register for military service."

I will make this easier for the interpreter by handing her another copy of the transcript.

The WITNESS: I didn't give that answer.

By Mr. GREAN:

Q. The next question was:

"Did these people also tell you that a United States citizen could register for military duty at the American Consulate?

"A. Yes."

Was that question asked and was that your answer?

A. When I lived—during the time that I lived in Mexico,
36 since my father died in 1935, I didn't know an American citizen that lived in Mexico.

Q. Your answer is that that question was not asked of you and that it was not your answer, is that correct?

A. I don't remember them having asked me that question.

Q. The next question was then:

"Why did you not register at the American Consulate in Chihuahua, Mexico near your home?

"A. Well, I will tell you again I did not want to register."

A. I did not answer that. They wrote that in there.

Q. All right, the next question was:

"Why didn't you want to register for military service with this country in 1944 and 1945 and 1946 prior to April 23rd of that year?

"A. Because I was afraid to register."

Was that question asked of you and was that your answer?

A. That is not my answer.

Q. The next question was:

"Why were you afraid?

"A. I was afraid of military service during the war."

Was that question asked you and was that your answer?

A. I didn't say I was afraid. I have never been in a war. I wouldn't know what a war is.

37 Q. Did you register for military service in Mexico?

A. Yes.

Q. And when was that?

A. In 1942.

Q. And did you know at that time that the United States was at war?

A. No one told me that it was.

Q. But you knew Mexico was at war at that time?

A. I didn't know anything. .

Q. But you registered for military service in Mexico?

A. Yes, I did just as any compatriot would do the same thing here. They would have to register. I register there and waiting to be—to become of age so then I could register here.

Q. Did you know that if you became of age you would then register in the United States?

A. There is a little confusion—something I want to get straight here. I also want to say that my mother wouldn't permit me to go out of the house. Didn't want me to go out of the house. Wanted me to remain at home all the time.

The COURT: You say you registered for military service in Mexico in 1942?

The WITNESS: Yes.

The COURT: Why didn't your mother want you to come to the United States?

38 The WITNESS: I don't know the reason. She might have been afraid that I would never come back there any more.

The COURT: Didn't she tell you if you came to the United States you would have to register for the war?

The WITNESS: No, she didn't tell me anything.

The COURT: Did you ever discuss that with her?

The WITNESS: I discussed that with her when I was 21 years old in order to get out of the house.

By Mr. GREAN:

Q. When did you first—I beg your pardon, your Honor. Did you have another question?

The COURT: Go ahead.

By Mr. GREAN:

Q. When did you first desire to come to the United States?

A. The first time that I decided to come to the United States

was in 1937 because the National schools here—I wanted to get a mechanical course—a course in mechanics.

Q. You first desired to return to the United States in 1937?

A. No, I did not decide. I had intentions of.

Q. Let me call your attention again into the hearing of 1947 and I will read this question and your answer:

"Q. The primary inspector states that you admitted to him today that you had the intention of returning to the United States since 1942. What do you have to say to that?"

39 and your answer was:

"Yes, that is correct."

Was that question asked and was that your answer?

A. My intention has always been to come back to the United States when I was quite young but my mother wouldn't let me.

The COURT: Was that your answer to the question of the Board?

The WITNESS: The answer is just the one I said from the beginning.

The COURT: May I ask——

By Mr. GREAN:

Q. Was that question asked of you and was that your answer?

A. This question that they kept asking me, they were basing their answer on the fact that they thought I was afraid and I was trying to say I wasn't afraid.

Q. Let me ask you this question then.

The COURT: I would like to ask counsel a question.

Mr. GREAN: Yes.

The COURT: Is there going to be evidence that these statements were made at that time?

Mr. GREAN: Yes, your Honor.

The COURT: Is there evidence or a stipulation to that effect?

Mr. GREAN: We have a stipulation to the effect that if

40 the officer of the Immigration Service were present he would testify that these questions were asked and the answer made and that this is a true transcript of the hearing.

The COURT: Is that correct, counsel?

Mr. WOLPIN: That is our stipulation, your Honor.

Mr. GREAN: Let me ask you this question.

"Q. Had it not been for your obligation to register in the United States for military service would you have come to this country during the years 1942, 1943, 1944 or 1945?

"A. I wanted to come to the United States in 1942 but my mother would not permit me to do so. I would have come to

the United States in 1944 or 1945 had it not been for the requirement to register."

Q. Was that question asked of you and was that your answer?
A. No, I did not answer like that.

"Q. Why were you willing to return to the United States on April 23rd, 1946?
"A. I came to the United States to work, to better my life."

Was that your answer to that question?

The COURT: Ask him to answer that yes or no.
Mr. GREAN: Let us get that yes or no answer clear and then you will have an opportunity to explain.

The WITNESS: I didn't understand that.

41 By Mr. GREAN:

"Q. Why were you willing to return to the United States on April 23rd 1946?
"A. I came to the United States to work, to better my life."
Was that your answer to that question?
A. (No answer)
Q. "Why were you willing to return to the United States on April 23rd, 1946?"
"A. I came to the United States to work, to better my life."
Now was that question asked of you and was that your answer.
A. No, it isn't exactly.

The COURT: What was the answer?

(Answer read)

By Mr. GREAN:

Q. The next question asked of you was "why did you not come to the United States in 1944 or 1945 to work and better your life", and your answer was:
"On account of the war."
Was that question asked and was that your answer?
A. That is the question they asked me. The answer was that because my mother didn't let me and not because I was afraid of the war.
Q. Now, I call your attention to a hearing before the Board, which was held in El Paso, Texas in October of 1950.
42 Do you recall that?
A. Yes, I believe I do.
Q. And at that time you were asked questions and you gave answers, is that true?
A. Yes.

Q. Now, I call your attention to that hearing and ask if in that hearing they did not read to you a transcript of your hearing of 1947?

A. Yes, they did read it to me but I did not admit it. They kept on writing the same.

Q. But they read your statement of 1947, is that right?

A. Yes, but everything they read was against me and I didn't accept anything like that.

Q. All right. I will read this question and your answer and see if it was asked of you and that was your answer:

"Q. What do you have to say regarding the hearing just read and translated to you in Spanish?

"A. I was denied admission because I was afraid but now I am willing to serve in the armed forces." Was that your answer to the question?

A. I did not say that I was afraid.

Q. I will ask you this question.

"Q. Why was your mother willing for you to come to
43 the United States in 1946 but unwilling for you to come to the United States in 1943, 1944 or 1945?

"A. In 1946 my mother was not afraid that I would be taken off to war."

Was that your answer to the question?

A. (No answer)

The COURT: Did you so testify?

The WITNESS: My answer that I gave at all times was that she did not want me to leave the house at any time.

By Mr. GREAN:

Q. And was the statement that you made in 1946:

"My mother was not afraid that I would be taken off to war," was that your answer?

A. She did not mention war to me.

Q. Now, Mr. Castaneda, did you ever state to the Board at the hearing of 1947 or in 1950, did you state or did you admit that you remained outside of the United States from 1944 to 1946 to avoid and evade military service in the armed forces of the United States?

A. No.

Q. Well, calling your attention back to the hearing of 1947 to this question:

"Q. Do you admit that you remained outside of the
44 jurisdiction of the United States from September 1944 until April 23, 1946 for the purpose of evading or

avoiding training and service in the land and naval forces of the United States?

"A. Yes."

Was that question stated to you and was that your answer?

A. No.

Q. Now, I call your attention again to the hearing of October 1950——

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. WOLPIN: Mr. Grean, pardon me, I don't believe we had a stipulation in reference to that. Our stipulation you said—shall I send for the man in Texas or will you stipulate he would testify that is a transcript of the hearing?

Mr. GREAN: This hearing in 1950 was held in El Paso, Texas. The hearing of 1947 was at El Paso, Texas. If counsel wishes a continuance for such time to bring a man in from Texas I will be happy to do so at great expense to the Government.

Mr. WOLPIN: It won't be necessary.

Mr. GREAN: It was my understanding that your stipulation covered the entire record.

Mr. WOLPIN: I will stipulate it will cover the entire record.

The COURT: I was just wondering why it is necessary to go on impeaching this man. Apparently he isn't going to admit
45 that he made any statements. If he gave that testimony there he has been impeached sufficiently that I wouldn't believe anything he said here. At this stage of the game I think the impeachment is sufficient to break down his credibility as a witness.

Mr. GREAN: I have brought it up to 1950. I would like to bring it up through 1952 which this record does, as to the same admissions and the correctness of what was said.

The COURT: That doesn't prove those admissions, counsel. That doesn't prove he made those statements. All it does is impeach him.

Mr. GREAN: Yes, it does.

The COURT: It affects his testimony here. That doesn't prove those were the facts.

Mr. GREAN: No, his testimony here is what I am impeaching.

The COURT: I know, but suppose you do impeach his testimony what is the effect? You have admitted that he was born in the United States.

Mr. GREAN: Yes.

The COURT: And whose burden is it to prove he stayed out of the United States for the purpose of evading military service?

Mr. GREAN: The plaintiff has that burden. The burden is on the plaintiff to prove his right to a judgment of nationality from this court. The burden is upon the Government to respond
46 to any defense they have to make.

The COURT: The burden is established as soon as it is established he is a citizen.

Mr. GREAN: If the court desires to have these proven as admissions rather than as impeachment evidence——

The COURT: I am looking at it this way, counsel. I am not questioning the fact he made those statements. That is I don't question the Government's records and I feel that his denial of those statements breaks down his own testimony here, but haven't you a burden to prove that he has lost his citizenship.

Mr. GREAN: It is very simple to prove he has lost his citizenship by calling the Immigration and Naturalization Service to show that they have excluded him on the ground that he lost his citizenship through expatriation. That is the purpose of this suit. That is the reason why he is here.

The COURT: I realize that, but this is a de novo proceeding. This is a trial de novo. These cases have given me considerable concern.

Mr. GREAN: The case heard by Judge Byrne——

The COURT: You refer to Judge Byrne's decision but his decision didn't approach the question of evidence so must as the question of age.

47 Mr. GREAN: We had two matters before Judge Byrne.

The COURT: I didn't read the second case. The question in my mind is this. We haven't only this group of boys who came back right after the Armistice and the purpose of these cases was to penalize those who would not participate in the war effort. The purpose of this statute was, for those people who refused to accept their responsibility during the war, was that they should lose their citizenship if they went beyond the borders of the United States for the purpose of evading military service. I realize the problem. Now they are talking about a third world war and are we going to have the same problem again. It is essential that these boys who stayed out of the United States to evade military service should lose their citizenship and should be deported, but I am wondering as to the question of proof. It isn't because I am not in sympathy with this Act. I am in complete sympathy with the purpose of the Act but how about taking a man's citizenship away from him on his own admissions. Would that be evidence?

Mr. GREAN: It has been evidence in other cases I have had before this court.

The COURT: Has there been any appeals on any of them?

Mr. GREAN: How else are we going about this, if the court please?

The COURT: That is what I am wondering, counsel, to be
48 frank with you.

Mr. GREAN: Now in the Japanese cases or the cases that arise in Italy or any of the other cases, unless actual records are kept how are we able to show——

The COURT: Take the Chinese cases, for instance, the question of whether they were born here.

Mr. GREAN: That is another story, but in the Japanese cases we admit birth in the United States and then they have gone abroad and commited an expatriating act and how do we determine that? By their own admissions. Now, they come in and try to justify the commission of that act. But here we have evidence before the court by stipulation that the man left the United States at the age of two years. He didn't return until 1946.

I have an admission that he knew about the war in 1942; that he knew of his duty to register; that he didn't come back because he was afraid of the war.

The COURT: Just a moment. You have admissions. You are impeaching him on that point. You haven't an admission in a sense —strike that, Mr. Reporter. What you are reading is not evidence.

Mr. GREAN: But this can be presented as evidence, if the court please. This can be presented as evidence. Let us assume for a moment that the officers who asked these questions and got these answers were present before the Court.

49 The COURT: I think your stipulation covers that.

Mr. GREAN: And I would ask them:

"Did you question the plaintiff with regard to why he remained in the United States of Mexico?"

The COURT: How many questions do you have to ask this witness?

Mr. GREAN: I have just a few more questions, your Honor.

The COURT: Well, I think we will take a recess until 2:00 o'clock and then I will hear those few questions. I presume this is the only witness you have.

Mr. GREAN: This is our only witness and then we will listen to the argument.

The COURT: I want to say frankly I feel that as far as this man's credibility is concerned I wouldn't believe him. It is just a question as to whether I can accept that as evidence. It is a legal point that I am concerned about. Do you understand my point, counsel?

Mr. GREAN: Yes, I do, your Honor.

The COURT: I realize it is a troublesome problem as far as the Government is concerned, but at the same time I don't know whether this is sufficient or not.

Mr. GREAN: We have had cases where the admissions of the plaintiff have been recorded in the usual course of business and to which the plaintiff admits he attended and the questions were

asked and answered at that time—whether he admits these specific questions or not and upon the basis that he attended the hearing, that he was present when the questions were asked and answered, and counsel has stipulated that the transcript is correct and stipulated that if the man were present he would testify that this is a true and correct transcription of the testimony. That is sufficient for admission into evidence.

The COURT: I would like to see a case that holds that. I would like to have an authority that holds that—a Circuit Court decision.

Mr. GREAN: Well, the court is asking for something that is very difficult to find.

The COURT: I realize that but I don't think another District Judge's opinion is any better than my view of it. I have that good opinion of myself.

Mr. GREAN: I do have cases wherein the testimony of the plaintiff taken in the usual course of business before an agency of the Government and transcribed and then reaffirmed at subsequent times, as this plaintiff has done, are admissible in evidence on several grounds. First it is admissible——

The COURT: Just a moment. I can stop a lot of argument there by having you give me the cases that hold that way.

Mr. GREAN: All right, I will bring them in, if the court please.

The COURT: I would like to see one because where there is testimony taken in the regular course of business is admissible because it is a part of the Government's records.

Mr. GREAN: I have a case on that point.

The COURT: That will be fine. We won't have any argument then.

Mr. GREAN: All right.

(Whereupon at 12:00 o'clock noon a recess was had until 2:00 o'clock p.m. of the same day.)

The COURT: You may proceed.

Mr. GREAN: If the court please, I would like to ask just two or three questions of the plaintiff which will bring his admissions up to date, up to 1952, as to the correctness of the statements and then I will proceed to a discussion of the points which the court has inquired about.

Daniel Castaneda Gonzales, the plaintiff herein, having been previously sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION (Continued)

By Mr. GREAN:

Q. Now, Mr. Castaneda, we have discussed this morning the hearings which you attended before the Immigration Board in 1947 and

1950. Now, I am going to ask you if you recall attending such a hearing in January, in fact on January 9th, 1952?

A. Yes.

Q. Now, I call your attention to a question which was asked of you and your answer and ask if that was asked and if this was your answer.

The COURT: Where was this hearing?

Mr. GREAN: That was held at Los Angeles, California. I believe it was at San Pedro, if the court please.

53 The COURT: Were there two attempts to enter the country?

Mr. GREAN: Yes, there were, your Honor. In fact there were more than two. There were three. There were several exclusions.

By Mr. GREAN:

"Q. In your hearing before boards of special inquiry at El Paso, Texas, in 1947 and 1950, did you admit that you had remained in Mexico during World War II for the purpose of evading or avoiding training or service in the armed forces of the United States during time of war and you were excluded as an alien immigrant not in possession of an unexpired immigration visa and passport?

"A. Yes, sir, I did, and they did tell me that I needed to get a passport and immigration papers to enter the United States. The only thing was I did not do so but entered without."

Was that question asked of you and was that your answer?

The COURT: Tell him to answer that yes or no.

The WITNESS: There are a lot of ways I just can't answer that yes or no.

The COURT: Tell him he can make an explanation after he answers the question. As I understand, counsel, in order to avoid the necessity of bringing witnesses here both of you have stipulated that these are true and correct; that if the parties who took these hearings were present they would testify that he had made

54 the statements that these transcripts indicate.

Mr. WOLPIN: That is our stipulation.

Mr. GREAN: Yes.

The COURT: Then shouldn't the transcripts be in evidence?

Mr. WOLPIN: I have no objection to it going into evidence your Honor.

Mr. GREAN: That is my desire, if the court please, to put them into evidence.

The COURT: Tell him he can answer the question yes or no and then make any explanation he wants.

The WITNESS: That is a very long question.

The COURT: Break it up. You were excluded in El Paso, weren't you?

The WITNESS: They let me come in in 1946.

The COURT: But in 1947 they wouldn't let you come in?

The WITNESS: They held me for investigation.

The COURT: Then they wouldn't let you in, would they?

The WITNESS: They didn't let me in.

The COURT: Then you went home, did you?

The WITNESS: I stayed in Juarez.

The COURT: Then after that did you try to come into the country at San Diego?

The WITNESS: The second time I *cam* in through El Paso. When I come in the second time I came over the same bridge and
55 same place in El Paso.

The COURT: In Texas?

The WITNESS: Yes, sir.

The COURT: How did you get to this district?

Mr. GREAN: He then was apprehended after he came in. He attempted to come in through San Ysidro.

The WITNESS: Just a minute.

The COURT: Did you attempt to come in at San Ysidro?

The WITNESS: The second time I come to the United States—the first time I came legally and then I returned in 1947 or 1951. I come the second time to the United States by El Paso. I say I am an American citizen and cross the border. That is all I say. Then I come to work here in California and my wife come from Chihuahua to Tijuana. I went to Tijuana and got permission and bring her here with me to Los Angeles and I come to ask for a permit at the immigration station right here and they told me I have to take my wife back to Tijuana. I take her back for three months and they don't let me bring——

The COURT: Wouldn't let you come back?

The WITNESS: They told me over there they have to find out if I can come to the United States or not and then I come to Mexicali.

By Mr. GREAN:

Q. Now this question that was asked of you.

56 The COURT: Break that question up.

By Mr. GREAN:

"Q. At your hearing before the Board of Special Inquiry at El Paso, Texas in 1947 and 1950, did you admit that you remained in Mexico during the war for the purpose of evading or avoiding training or service in the army?

"A. No.

"Q. And were you excluded as an alien immigrant not in possession of an immigration visa or passport?

"A. Yes."

Q. Now that was the question asked of you?

A. Yes, they held me back.

Q. That much was the question asked of you and that is the answer that you gave. Now, you wait until I give you the answer and then you tell us whether that was your answer.

"A. Yes, I did."

Q. And then the question—your answer:

"A. And they did tell me that I needed to get a passport and immigration papers to enter the United States. The only thing was I did not do so but entered without.

Now was that question asked you?

A. Yes, they asked me that question but because I didn't have these documents—I did not admit having come in in the form that they suggested.

57 I call your attention to another question asked of you in that hearing and your answer and ask if it was asked of you and that was your answer:

"Q. Was fear of military service in time of war the only reason that you did not register for United States military training and service prior to 1946?

"A. The only true thing is and the only one I give now is my mother's fear of military service for me. I could have registered for it at Chihauhua, Mexico. I went there two or three times, the capitol of the state. It was because of the fear of my mother that I did not do so before 1946."

Was that question asked of you and was that your answer?

A. My mother never mentioned anything about fear. The only thing she mentioned was she didn't want me to go out of the house.

Q. All right. I will call your attention to the question on page 10 at the top:

"Q. Were you aware that you could have registered for the United States military service in Mexico prior to 1946 had you desired to do so?

"A. Yes, sir. I later thought of registering for it in Chihuahua, Mexico where I went a few times, but as my mother did not wish me to do so I did not do so."

58 Was that question asked of you and was that your answer?

A. No, I did not say that.

Mr. GREAN: At this time, if the court please, I wish to offer the transcripts of the hearings in evidence and subject to counsel's stipu-

lation that the court may consider the certified copy of said transcripts which were submitted in the case of this plaintiff versus Landon on habeas corpus which is in the court's file.

Mr. WOLPIN: I will so stipulate.

Mr. GREAN: And further I offer those portions of the record which were used to indicate the admissions against interest unless counsel desires to have the entire record considered by the court and in that case I will have no objection.

Mr. WOLPIN: I have no objection to the court considering the entire record.

Mr. GREAN: You didn't give the number of that case. I submit for the court's consideration the certified copies of the records of the administrative hearing of this plaintiff under the seal of the Immigration and Naturalization Service which is contained in the court's file of Case No. 14669, Castaneda vs. Landon.

The COURT: As I understand the stipulation it is stipulated that if the proper officers were called they would testify that he had answered the questions in the way that they are answered
59 in that transcript?

Mr. GREAN: Exactly.

Mr. WOLPIN: That is the stipulation.

Mr. GREAN: The only other way we can avoid their presence—I mean submit this evidence without such a stipulation would be to have the officers on the stand and ask if he asked that question and that was answered that way.

The CLERK: Do you want me to give this an exhihbit number?

Mr. GREAN: May I have that marked as an exhibit by reference?

The CLERK: Defendant's Exhibit A.

The COURT: Any further questions?

Mr. GREAN: No.

Mr. WOLPIN: I have one or two questions.

REDIRECT EXAMINATION

By Mr. WOLPIN:

Q. You were admitted to the United States on April 23rd, 1946, is that correct?

A. Yes.

Q. At the time of the admission you claimed to be an American citizen, is that right?

A. Yes.

Q. What evidence did you show the Immigration Service at that time that you were an American citizen?

A. A birth certificate and baptismal certificate.

60 Q. Did anything happen on April 24th, 1946, if you know?

A. Yes.

Q. That 24th day of April what happened?

A. I got up quite early in the morning. I went outside and some immigration inspector was driving by. He apparently saw me. I went back into the house and he came and picked me up and took me to the station, the immigration station. He questioned me at length to the effect if I had voted in Mexico. I told him no. He particularly wanted me to say that and I told him no and then they took me down there and took a statement and then they went me home—then I *cam* home.

Q. Did they permit you to remain in the United States at that time?

A. Yes.

Q. How long did you remain in the United States after the 24th of April 1946?

A. Until the immigration held me on the 1st of October.

Mr. WOLPIN: Nothing further.

Mr. GREAN: No further questions.

The COURT: That is all. Does the Government rest?

Mr. GREAN: The Government rests.

Mr. WOLPIN: The plaintiff rests.

The COURT: I am ready to hear any argument that you have.

ARGUMENT ON BEHALF OF DEFENDANT

Mr. GREAN: I call the court's attention to two matters,
61 the matter of admissibility I don't think is of importance. Now, I do wish to call the court's attention, however, to a matter that this court raised in another case very similar to this one.

The COURT: Myself?

Mr. GREAN: Yes.

The COURT: That is one of the questions that always bothers me.

Mr. GREAN: "Can this court hang a judgment on the flimsy support of uncorroborated admissions against interest". Because in that case all we had were uncorroborated admissions. We had no circumstances or facts from which the court could draw inferences. We merely had admissions such as these before the immigration authorities and at that time I quoted from Wigmore on Evidence.

The COURT: Did you sell me at that time?

Mr. GREAN: Yes, I did, your Honor. I read this sentence from Wigmore and you said that was all you wanted to hear.

The COURT: What volume?

Mr. GREAN: Volume No. 7.

The COURT: What page?

Mr. GREAN: Page 406, wherein it is stated:

> "There is no general rule that the admissions of a party in a civil case are insufficient, without corroborating evidence, as a foundation for a verdict."

62 And that was the statement upon which we rested at that time. We determined at that time that there are certain cases, like divorce actions, there are cases of confessions wherein certain corroboration is required by statute. This is not such a case.

Then the court raised a point today which I would like to merely call attention to because Wigmore says in Volume 4 at page 4 in Section 1048, he says that:

"The probative value of the use of admissions is two-fold."

Now the first purpose is accomplished by the court's statement that there has been sufficient impeachment of the testimony of the witness. He has been impreached. We can't believe him.

That is the first probative value that Wigmore makes. He says:

"In the first place, all admissions may furnish, as against the opponent, the same discrediting inference as that which may be made against the witness in consequence of a prior self-contradiction; the nature of this inference, both in its strength and in its weakness, has been already examined and need not be here reconsidered. In the next place, all admissions used against the opponent——"

63 Now, I stress the word "opponent" because this is distinguished from admissions of a witness. We are not trying to contradict a witness. We have the party in the case.

"All admissions used against the opponent, satisfy the hearsay rule, and, when once in, have such testimonial value as belongs to any testimonial assertion under the circumstances."

In other words, what I am saying to the court now is that the value of these admissions against interest once they are in have the two-fold purpose of to impeach the witness and second, to present evidence by way of testimonial value to the court. And that is what I think has been done in this case.

The COURT: Well, I think that you have cured most of my complaints by the stipulation here that if the witnesses were present they would testify in accordance with the questions and answers that were read.

Mr. GREAN: Wigmore just goes on to say:

"And the more notably they run counter to the natural bias or interest of the party when made, the more credible they become; this element adding to their probative value, but not being essential to their admissibility."

So if the court please, while it is always difficuelt for the Government in such a case to bring in affirmative evidence, it is only through the ex...mination of the plaintiff that we can de-

64 termine whether or not he has committed expatriation acts, and at a time when he has no reason to conceal the truth

he admits the expatriating acts and states sufficient corroboration to go with the physical factors of remaining in the country, entering for the very first time in 1946.

There you have a combination of factors, an admission of the intent, a physical remaining outside of the country, which I submit is sufficient to sustain the burden of the Government.

ARGUMENT ON BEHALF OF PLAINTIFF

Mr. WOLPIN: May it please the court, and counsel. If this were merely a case of a man who received a I-A classification, left the country for the purpose of evading or avoiding service in the military service, it would be a very simple matter.

However, in this case, your Honor, we have a man who was born of dual nationality. I don't know how familiar your Honor is with dual nationality.

The COURT: I think I am sufficiently familiar for this case.

Mr. WOLPIN: That man was a Mexican at birth by being born of Mexican parents. He was an American citizen by virtue of his birth in this country under the Fourteenth Amendment of the Constitution. He was born in one of the states of the United States.

65 We have the case of Perkins in 307 U. S. 325.

The COURT: I am familiar with that case.

Mr. WOLPIN: That case says that a person who was born a dual nationality does not have to decide—does not have to make an election of nationality until after they have attained their majority.

This man, your Honor, did not attain his majority until July 24th, 1945.

Furthermore, by the Nationality Act they were given two years after attaining their majority within which to come to the United States in order to retain their American citizenship.

I believe your Honor is familiar with that.

If your Honor please, there are two cases in the administrative decisions, immigration and nationality laws of the United States that I would like to call to your Honor's attention. They are on all fours with the case at bar. The first is the matter of G-M at page 860.

The COURT: What year?

Mr. WOLPIN: 1947.

The COURT: What page?

Mr. WOLPIN: 861. May I give you the facts of that case?

The COURT: Yes.

Mr. WOLPIN: The appellant was born in Kansas in 1925 and acquired citizenship under the Fourteenth Amendment to

66 the Constitution.

The Board of Special Inquiry found that he had ex-

patriated himself under Section 401-J of the Nationality Act as Amended.

Appellant resided in Mexico since 1931. He states he did not register for military service because he thought he would be called for military duty and wished to stay with his family in Mexico.

He stated that he remained in Mexico for the purpose of supporting his two dependent sisters, who are now accompanying him to the United States.

He states he does not know why he did not bring them to the United States until two years ago.

The appellant was ordered excluded and the Board of Immigration Appeals admitted him as an American citizen saying that his sole reason for remaining in Mexico was not to avoid service in the armed forces of the United States.

If your Honor please, when this Act was before Congress—I have the conversations that took place with reference to its purpose—with reference to the purpose of its passage and that is found in immigration proceedings at page 280.

The COURT: It will not be necessary to read that, counsel. I will do that myself.

Mr. WOLPIN: There is one more case I would like to call to the attention of the court and that is 2 Immigration and Naturalization Decisions at page 910. In my pretrial statement I
67 quoted from this decision.

"The appellant is 28 years of age. The appellant acquired United States citizenship by virtue of birth, November 19, 1918. Applied for admission of United States citizenship on June 8, 1947. June 9, 1947 a special board of inquiry concluded he had lost his American nationality under Section 401-J of the Nationality Act amended September 24, 1944 by remaining outside of the jurisdiction of the United States to evade or avoid military service in time of war and excluded him on the above stated ground.

"He appeals and the Board of Immigration Appeals admitted him as an American citizen saying——"

The COURT: You do not need to read that.

Mr. WOLPIN: The Board of Immigration Appeals admitted him as an American citizen saying that on this evidence—well, I might give you an admission that he made:

"Q. Then you voluntarily remained outside the United States to avoid training and service in the armed forces of United States, is that correct?

"A. Yes, sir."

The Board of Immigration Appeals says:

"On this evidence we think that appellant was not expatriated. Appellant remained in Mexico because he was liv-

ing in that country and because it was necessary for
68 for him to continue to support his family."

The legislative history shows Congress——

The COURT: You do not need to go into that, counsel.

Mr. WOLPIN: What Congress had in mind was those people who departed from the United States during the war expected to remain outside until the war was ended. But however where a person has resided abroad for a lengthy period of time there are considerations other than the desire to escape military service which explains the fact that he continued to reside abroad.

If your Honor please, this boy lived for 20 years in Mexico. I mean it wasn't as if he had received a notice from the draft board to report for military duty and ran across the border. I mean he was under his mother's jurisdiction until he became of age.

He had three or four sisters of school age. He went to school from the time he was six until the time he was 10 and now he comes before a board of special inquiry and with all of their knowledge—with their knowledge of the immigration laws and all the ways to trap him—I don't see—everything that he did say, whatever admissions he did make, the words were actually put into his mouth.

Your Honor, I submit in view of the fact that he was a dual nationality, that there was no duty on him to make an election of nationality until he attained his majority—and he had
69 within two years after obtaining his majority to return to the United States in order to retain his citizenship and I submit, your Honor, that when he came in on April 23, 1946, exhibitied his American birth certificate showing birth in the United States and a baptismal certificate that was his election of nationality. It was then and there that he chose to make an election and I think he should be considered an American citizen.

Your Honor, this man has spent more than six months at Terminal Island now rather than go back to Mexico.

That is all I have to say, your Honor.

STATEMENT OF THE COURT

The COURT: Gentlemen, I think in the first place you have to consider that this young man is far above the ordinary intelligence of many of his people. He is not what you call a peon by any means. He is a pretty bright young fellow.

But I must consider the fact that he tells me he didn't know a war was on. I just can't believe that. I don't believe his testimony is that respect. I think he has been fully impeached. I don't think his word here is anything but self-serving testimony. I just don't believe it.

He knew a war was on. He knew there was a responsibility on his part and he knew he was over the age where he could have en-

listed, come to the United States for that purpose. I think the law provided for 18 year old boys to enlist at that time.

70 I further believe that his testimony before the immigration officers was far more accurate and more near the truth than after he consulted counsel and found out what his legal rights were.

I can understand why he may have felt at that time that it was safer to stay in Mexico and not take chances of being killed or wounded in the war. He remained outside the United States for that purpose and it is my opinion—and I know these cases have been very troublesome. You understand what the court said this morning. They are troublesome to the court and to all the authorities, but when a person has had three hearings and each time has testified as to the reasons for remaining out of the United States —I think when a person who remains out of the United States during the time of war should explain why he didn't fulfill his obligation.

I don't believe him when he said he didn't know that there was a war going on or didn't fully appreciate his responsibilities.

I feel that the plaintiff failed to make a case here. I think that he has not established his citizenship. He has lost his citizenship by reason of remaining in Mexico and remaining there for the purpose of evading military service in the United States.

I wish someone would appeal one of these cases. We have

71 had a number of them. I would like to have an opinion from the Circuit Court, some definite line of cases which we could rely upon.

I had a similar case to this but that was a case where a boy was away in the depths of Mexico and I admitted him because I felt he didn't appreciate or have an opportunity to recognize his obligations. But in that respect it seems to me that this boy was standing pat on his dual citizenship to see whether it was safer to be a citizen of Mexico or the United States during its time of need of manpower. That was the time when he deserted the country and refused to come back.

When a boy of that kind comes in and tells me his mother wouldn't let him out of the house, he couldn't come because his mother wouldn't let him out of the house, I don't know how such foolish statements can be made. I appreciate he has been in Terminal Island for a long time but that doesn't change the picture before me.

I feel therefore, that the Government is entitled to a judgment of dismissal.

I don't know how you can ask, counsel, me to find for the plaintiff here in view of his admissions and statements before the immigration officer.

Mr. WOLPIN: I didn't ask your honor to disbelieve any of the statements. In fact I stipulated to the entry of them. I did
72 not see the record before I filed this action, your Honor, and of course I can only take my client's word for what went on.

The COURT: This plaintiff is an intelligent young man and he probably would have made a good soldier and made a good citizen, but he decided not to be a good soldier so therefore he can't be a good citizen.

Mr. WOLPIN: Thank you, your Honor.

The COURT: Do you wish findings?

Mr. WOLPIN: I will waive findings.

(Whereupon, at 2:45 o'clock p.m. the above-entitled proceeding was concluded.)

73 (File endorsement omitted.)

Reporter's Certificate to foregoing transcript omitted in printing.

74 Minute entry argument and submission—July 15, 1954 (omitted in printing).

75 In United States Court of Appeals for the Ninth Circuit

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—September 8, 1954

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

76 In United States Court of Appeals for the Ninth Circuit

No. 13,929

DANIEL CASTANEDA GONZALES, Appellant

vs.

H. R. LANDON, District Director of Immigration and Naturalization of District No. 16, and HERBERT BROWNELL, Attorney General of the United States, Appellees

Upon Appeal from the United States District Court for the Southern District of California, Central Division

OPINION—September 8, 1954

Before: STEPHENS, FEE and CHAMBERS, *Circuit Judges*
JAMES ALGER FEE, *Circuit Judge:*

This proceeding is for declaration of citizenship. Gonzales alleges he was born at Santa Rita, New Mexico, July 21, 1924. It is also alleged he is confined for deportation. The answers were denials of citizenship and, affirmatively, that plaintiff remained out of the United States in time of war for the purpose of evading military service and that there was no claim upon which relief could be granted.

It was stipulated at trial that plaintiff was born in the United States and, when less than two years of age, was taken to the Republic of Mexico. There are implications in the testimony that his parents were both aliens and citizens of Mexico, but the point was not developed. Plaintiff testified that from 1926 to 1946 he resided in Favela, Chihuahua, Mexico. His father died, and plaintiff testified he did not come to the United States because his
77 mother would not let him. He testified he registered for military service in Mexico in 1942. He also stated that he was admitted to the United States on April 23, 1946, upon his claim of United States citizenship by the presentation of a birth certificate and a baptismal certificate to the Immigration Service.

The statements of the plaintiff before a Board of Special Inquiry of the Immigration Service in 1947, 1950 and 1952 were introduced in evidence. There was a stipulation that, if the officers were called, they would verify his answers as shown in the transcript. Plaintiff swore that he did not make the answers and that he had not knowingly remained in Mexico in order to avoid military service.

The District Court determined that although plaintiff was a citizen by birth he had expatriated himself by remaining outside the jurisdiction of the United States in order to avoid training and service in the armed forces of this country in time of war.[1] Plaintiff claims the United States had the burden of proof to show Gonzales was no longer a citizen. The trial court followed the contention. We do not have to pass upon the validity thereof. The trial

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[1] "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: * * * (j) Departing from or remaining outside of the jurisdiction of the United States in time of war * * * for the purpose of evading or avoiding training and service in the land or naval forces of the United States." A t, Oct. 14, 1940, c. 876, Title I, subchap. IV, Sec. 401, 54 Stat. 1168, as amended Sept. 27, 1944, c. 418, Sec. 1, 58 Stat. 746, 8 U.S.C.A. Sec. 801(j).

judge decided the questions of fact. If the judgment had substantial evidence to support it, this Court should affirm.

Under our system, citizenship is a matter of voluntary choice. This country fought a war largely upon the issue that subjects of foreign potentates who voluntarily become American citizens had the right lawfully to expatriate themselves. This power is accorded to American citizens by birth or naturalization. The recent statute defines in general the acts whereby an American citizen may voluntarily expatriate himself.[2] This Court once held that a citizen by birth could be expatriated during minority by act of the
78 parents.[3] This holding went too far and was wrong.[4] But a voluntary act of a party which clearly indicates a desire for and is declared by law to result in expatriation is conclusive. The statute which lists these acts is constitutional.[5]

It is probable that Gonzales had citizenship in the United States and in the Republic of Mexico during his minority. His registration for military service in Mexico would seem to indicate a choice of citizenship in that country.

But the ground which the Court chose here was that Gonzales was expatriated by his voluntary act with intent of avoiding military service. The plaintiff swore to the contrary. The finding of the Court is overwhelmingly supported by statements of plaintiff himself before the officers in 1947 and 1950. The objection urged here is that such statements are hearsay and inadmissible except for purposes of impeachment. The plaintiff's testimony in the record is contrary to these statements. From the facts then in the record, that plaintiff, an American citizen, remained in Mexico while the United States was involved in a war in which it was his duty to offer military service and that he made no effort to come within the borders until it was apparent the need for his service had passed, the Court might have drawn the obvious inference that the absence from the country was voluntary and for the purpose of evading military duty. If the trial court found plaintiff not credible as a witness and disbelieved his testimony in court as to a contrary state of mind, the case of plaintiff would then fail.

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[2] Act, June 27, 1952, c. 477, Title III, c. 3, Sec. 349, 66 Stat. 267, 8 U.S.C.A. Sec. 1481, et seq.

[3] United States v. Reid, 9 Cir., 73 F. 2d 153, reversing In re Reid, D. Oregon, 6 F. Supp. 800.

[4] Perkins, Secretary of Labor v. Elg, 307 U.S. 325, 349.
MacKenzie v. Hare, 239 U.S. 299.

[5] This Court has said that it is bound by the statute unless it can be said that it is "clearly unconstitutional, a conclusion without rational foundation." Miranda v. Clark, 9 Cir., 180 F. 2d 257, 259.

But these extrajudicial statements of plaintiff were not hearsay. These were substantive evidence. The extrajudicial statements of a party to the action, civil or criminal, are binding upon him and substantive evidence against him.[6] There is an addi-
79 tional reason for the admission of these well-authenticated utterances of plaintiff, since they were statements against interest and thus have further guarantee of verity.[7] They were clearly admissible for all purposes. The only question which gave pause at the threshold was whether these were admitted only for the purpose of impeachment. An examination shows that the record of the hearings, including these statements of plaintiff, was admitted upon stipulation of counsel for plaintiff for all purposes.

The judgment of denial of a declaration of citizenship is affirmed.

[File endorsement omitted.]

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[6] "* * * all admissions, used against the opponent, satisfy the Hearsay rule, and, when once in, have such testimonial value as belongs to any testimonial assertion under the circumstances; and the more notably they run counter to the natural bias or interest of the party when made, the more credible they become; this element adding to their probative value, but not being essential to their admissibility." IV Wigmore on Evidence, Sec. 1048 (3rd Ed.). Harrison v. United States, 10 Cir., 42 F. 2d 736, 737.

[7] "The modern rule, as we see it, is that a statement (even though unsworn) is admissible as substantive evidence, if the fact asserted in the declaration is so far contrary to the declarant's pecuniary or proprietory interest, or so far subjects him to criminal or civil liability, or renders him an object of hatred, ridicule or social disapproval, that a reasonable man would not have made such a statement unless he believed it to be true." Schoeps v. Carmichael, 9 Cir., 177 F. 2d 391, 398, certiarari denied, 339 U.S. 914. IV Wigmore on Evidence Sec. 1455, et seq.

80 In United States Court of Appeals for the Ninth Circuit

No. 13,929

DANIEL CASTANEDA GONZALES, APPELLANT

vs.

H. R. LANDON, District Director of Immigration and Naturalization of District No. 16, and HERBERT BROWNELL, Attorney General of the United States, APPELLEES

JUDGMENT—Filed and entered September 8, 1954

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(File endorsement omitted.)

81 Clerk's Certificate to foregoing transcript omitted in printing.

82 SUPREME COURT OF THE UNITED STATES, October Term, 1954

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 5, 1955.

WM. O. DOUGLAS,
Associate Justice of the Supreme Court of the United States.

Dated this 7th day of December, 1954.

83 SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—May 31, 1955

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, and the case is transferred to the appellate docket as No. 831.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 355005 195

FILED
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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 111

DANIEL CASTANEDA GONZALES,
Petitioner,

vs.

H. R. LANDON, District Director of Immigration and Naturalization of District No. 16, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S OPENING BRIEF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 111

DANIEL CASTANEDA GONZALES,
Petitioner,

vs.

H. R. LANDON, District Director of Immigration and Naturalization of District No. 16, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S OPENING BRIEF

Opinions Below

The trial court rendered no written opinion. The opinion of the court below is reported at 215 F. (2d) 955.

Grounds on Which the Jurisdiction of This Court Is Invoked

This court has jurisdiction under 28 USC 1254(1). The judgment of the court below, the United States Court of Appeals for the Ninth Circuit, was entered on September 8,

1954 (R. 38). Time for filing petition for writ of certiorari was extended to and including February 5, 1955. (R. 38) The petition was filed on February 4, 1955 (R. Cover Page). Certiorari was granted on May 31, 1955. (R. 39)

Constitutional and Statutory Provisions Involved

Section 1 of the Fourteenth Amendment to the United States Constitution:

> "All persons . . . born in the United States, and subject to the jurisdiction thereof, are citizens of the United States. . . ."

Fifth Amendment to the United States Constitution:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Section 401(j), Nationality Act of 1940 (8 USC 801(j)), (Act, Oct. 14, 1940, c. 876, Title I, Subchap. IV, § 401, 54 Stat. 1168, as amended Sept. 27, 1944, C. 418, Sec. 1, 58 Stat. 746):

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> "(j) Departing from or remaining outside the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

Questions Presented For Review

1. Whether on its face, and as applied, 8 USC 801(j) is constitutional under the due process clause of the Fifth

Amendment and the citizenship clause of Section 1 of the Fourteenth Amendment.

2. Whether 8 USC 801(j) is to be construed so as to expatriate a native born citizen who had been living since infancy in Mexico and who was still living there when the said section was passed and who registered for military service in Mexico pursuant to Mexican law.

3. Whether respondent carried its burden of proving that petitioner expatriated himself under 8 USC 801(j) by clear, convincing and unequivocal evidence.

Statement of the Case

Petitioner was born in the United States on July 21, 1924 (R. 7). He was taken by his parents to reside in Mexico when he was two years old (Ibid) and resided there with his mother and younger brothers and sisters, his father having died in 1935 (R. 8), until he came to the United States on April 23, 1846 (R. 12).

At the time of the filing of suit in the District Court, petitioner was in the custody of the Immigration and Naturalization Service, being held for deportation to Mexico on the ground that petitioner had lost his United States citizenship under 8 USC 801(j), (R. 1, 13).

The complaint was filed under Section 503 of the Nationality Act of 1940 (8 USC 903) for a declaration that petitioner is a national of the United States (R. 1).

The only evidence at the trial was the testimony of petitioner and the transcription of questions asked of and answers given by petitioner before officers of the Immigration and Naturalization Service (Exhibit A; R. 27).

The testimony of petitioner at the trial produced no evidence to the effect that he had departed from or remained outside the jurisdiction of the United States at any time for the purpose of avoiding training and service

in the land or naval forces of the United States. The only evidence before the court on this question was pursuant to a stipulation (R. 27) between counsel that if officers of the Immigration Service were called as witnesses they would testify that in 1947 (R. 13), 1950 (R. 18) and 1952 (R. 24) certain questions were asked of petitioner and certain answers given by him. Concededly, though confusedly (cf. R. 26), among the questions and answers these officers would have testified to were questions and answers to the effect that petitioner had remained outside the United States from September, 1944 until April 23, 1946 for the purpose of evading or avoiding training and service in the land and naval forces of the United States (R. 19, 20).

Petitioner at the trial denied that he had made such answers to such questions (e.g. R. 20), but the trial court accepted (R. 33) the in absentia testimony of the immigration officers that petitioner had been asked such questions and had given such answers. Based thereon, the trial court held (R. 5) that petitioner had remained outside the United States from September, 1944 until April 23, 1946 for the purposes of evading or avoiding military training and service in the United States, and therefore had lost his citizenship.

Petitioner testified both at the trial (R. 10) and before the immigration officers (R. 11, 19) through an interpreter. At the trial, the first interpreter, a representative of the Immigration Service (R. 9), proved to be unsatisfactory (R. 11) and the court required another one to be procured. (Ibid.).

There is no evidence of any kind that petitioner intended to expatriate himself, or consented thereto or had knowledge of the consequence that one might lose his citizenship by remaining outside the United States for the purpose of evading military service.

ARGUMENT

Summary of Argument

Since the petitioner was born a citizen of the United States, the Government, in order to prove that petitioner lost his nationality, must do so by evidence that is clear, convincing and unequivocal;—evidence leaving no troubling doubts. The evidence adduced by the Government to prove the fulfillment by petitioner of the conditions called for in 8 USC 801(j) did not rise to that high standard of required proof.

If petitioner did remain outside the United States for the purpose of avoiding military service, there is still no loss of citizenship, because 8 USC 201(j) should be interpreted, in order to avoid unconstitutionality, so as not to apply to the facts of this case where petitioner had been taken as an infant to Mexico, lived there all his life, and the law in question was passed while he was still a minor, living with his mother abroad. The statute, being penal in nature, should be strictly construed.

If applicable to the facts of this case, the statute is unconstitutional, because Congress has no power to legislate away rights which are constitutionally endowed, absent a knowing and intelligent waiver, and specifically in regards to taking away citizenship, absent consent of the citizen and absent a knowledge of the consequences of his act or acts.

I

Section 401(j) of the Nationality Act of 1940 (8 USC 801(j)) is unconstitutional

A

Preliminary Statement

Unlike the original subsections of Section 401 which were concerned with the problem of dual nationality and allegiance,[1] Section 401(j) is an out and out punitive statute. Thus in urging the legislation, the Attorney General said (pgs. 2 of S. Rept. 1075 and H. Rept. 1229, 78th Cong. 2d Sess.):

> ". . . Persons who are unwilling to perform their duty to their country and abandon it during its time of need are much *less worthy of citizenship* than are persons who become expatriated on any of the existing grounds." (Italics added.)

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[1] See Cabinet's Letter of Submittal to the President on the proposed Section 401, as reported in *Dos Reis* v. *Nicolls*, 161 F. 2d 860, 863:

> ". . . None of the various provisions in the Code concerning loss of American nationality . . . is designed to be punitive or to interfere with freedom of action. They are merely intended to deprive persons of American nationality when such persons, by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United States."

And see statement by Congressman Rees, Manager on the part of the House (86 Cong. R. 1):

> ". . . Not only do the nationality laws need clarifying and orderly arrangement in a single code, but substantive changes are necessary in connection with certain rights, with a view to preventing persons *who have no real attachment* to the United States from enjoying the high privilege of American nationality." (Italics added).

And Congressman Dickstein said (90 Cong. Rec. 3261):

> "Any man, any American, who leaves this country for the purpose of not serving his country in time of war is a *traitor,* in my judgment." (Italics added)

While Chairman Russell said (90 Cong. Rec. 7628):

> "Certainly those who, having enjoyed the advantages of living in the United States, were unwilling to serve their country to subject themselves to the Selective Service Act, should be *penalized* in some manner." (Italics added.)

But where does Congress derive power to punish "unworthy" persons[2] by de-citizenizing them in the face of the Constitutional grant of citizenship? Unlike the power of Congress, pursuant to Article I, Section 8, Cl. 4, to condition the grant of naturalization (Cf. *Lapides* v. *Clark,* 176 F. 2d 619; cert. den. 338 U. S. 860; reh. den. 338 U. S. 888), Congress has no such power, absent consent, to take away that which the Constitution grants.

Petitioner is a citizen of the United States, not by grace of Congress, nor by its Act. He is a citizen by virtue of the United States Constitution (Amendment Fourteen). A constitutional right which the *Constitution* and not *Congress,* grants him, may not be taken away from him involuntarily. Article VI, Section 2 of the Constitution provides that "(t)his Constitution and the laws of the United States made in pursuance thereof . . . (are) the supreme law of the land." It can scarcely be said that a law which takes *away* citizenship which has been *granted* by the Constitution is a law made *in pursuance* of that Constitution. On the contrary, such an act is in direct derogation thereof.

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[2] Or to thus punish treason in the light of Art. III, Sec. 3 of the Constitution?

In *Dos Reis* v. *Nicolls,* 161 F. 2d 860 (CCA 1 1947) the court discusses the constitutional problem here involved (161 F. 2d at 862) and expresses doubt as to the validity of such legislation, but does not reach the question because it construed Section 401(c) in such a way as to avoid it. However, that court did recognize that expatriation cannot be effected unless the act performed or condition entered into is performed voluntarily "with notice of the consequences." And that court quoted from this court's decision in *Mackenzie* v. *Hare,* 239 U. S. 299,311, that

> "a change in citizenship cannot be arbitrarily imposed, that is imposed without the concurrence of the citizen."

Holding directly that *Congress* has no authority to destroy, diminish, or dilute the *United States citizenship conferred by the Fourteenth Amendment to the Constitution* of the United States, is *United States* v. *Wong Kim Ark,* 169 U. S. 649. In that case this Court declared (at p. 703):

> " . . . *The power of naturalization, vested in Congress* by the Constitution, *is a power to confer citizenship,* not a power to take it away." (Italics added).

B

The Right of Expatriation Is Not to Be Equated with the Penalty of Expatriation

It is clear that a United States citizen may not renounce his citizenship without the consent of the Sovereign.

In *Shanks* v. *Dupont,* 3 Pet. (U. S.) 242,246, this court said:

> "The general doctrine is, that no persons can, by any act of their own, *without the consent of the government,* put off their allegiance and become aliens." (Italics added)

Accord: *Murray* v. *The Schooner Charming Betsy*, 2 Cranch (U. S.) 64, 120.

This is consistent with what the text writers have said on the subject.

In Getty's *The Law of Citizenship in the United States*, (Univ. of Chicago Press, 1934) at page 160, this explanation is made:

> ". . . The right of an individual to terminate his native allegiance without the consent of his native country has been the subject of prolonged controversy and disagreement among the states of the world. International law recognizes that each state decides for itself whether or not expatriation is permissible. At present there seems to be no agreement as to the existence of a 'right of expatriation.' Some states have indicated a recognization of the doctrine of voluntary expatriation under certain conditions, as specified in bilateral treaties. Other states recognize the right unconditionally, while still others do not permit the expatriation of their citizens except by special consent . . ."

Dutcher in his article, *The Right of Expatriation*, 11 Amer. L. R. 447, 474, exhaustively reviews the subject and says:

> "The whole body of Federal law . . . announces with greater or less distinctness that a citizen of the United States cannot absolve himself from his allegiance thereto without some law of the United States permitting him so to do. Nor does the act of 1868 change the rule."

Swift, in *A System of the Laws of the State of Connecticut* (Windham, Conn., 1795-96, Vol. 1, P. 164), says:

> "Natural allegiance is the perpetual obligation to government binding on all mankind. It is a duty which

> they owe and which they can never renounce and disclaim, *without the consent and concurrence of the supreme power of the state.*" (Italics added.)

Blackstone put it this way:

> "Allegiance is the tie, or *ligamen,* which binds the subject to the King, in return for that protection which the King affords the subject. . . .
>
> ". . . (T)his natural *allegiance* . . . *cannot be devested without the concurrent act of that prince to whom it was first due.*" (Second italics added) (1 Blackstone, Commentaries, 367 et seq.)

Hence, it became necessary for Congress in 1868 to pass legislation giving such consent. And it did so in eloquent language. (R. S. 1999; 8 USC (1946 Ed) 800). But even today, (8 USC 1483) Congress has withheld consent to expatriation in certain cases. (Cf. *In re Grant,* 289 F. 814 (DC SD Cal. 1923; *United States* v. *Kuwabara,* 56 F. Supp. 716 (DC ND Cal. 1944)).

One of the most recent examples of the necessity for governmental consent before a citizen can throw off the mantle of citizenship occurred also during World War II when Congress enacted 8 USC 801(i) (c. 368, Sec. 1, 58 Stat. 677) with reference to the American-born Japanese who had been evacuated from the Pacific Coast and were held in camps by the United States Government. An account of this is set out in *Acheson* v. *Murakami,* 176 F. 2d 953, 962 (CCA 9, 1949) (Finding 19).

Also demonstrating the necessity for the consent of the sovereign is *Kawakita* v. *United States,* 343 U. S. 717 where, in defense to a charge of treason, the defendant contended that he had exercised his "natural and inherent right" to expatriate. This contention was rejected.

If, then, a citizen cannot expatriate himself without the consent of the sovereign, especally because of the constitutional root of native born American citizenship, the Sovereign cannot yank off the mantle from the citizen without his consent, voluntarily entered into "with notice of the consequences." United States citizenship is a two-way highway, not a one-way street. Neither the Government may impose its loss nor may the citizen shed it without the consent of the other. This is not new doctrine. As seen, it was recognized as early as Blackstone's time. And see Chief Justice Parsons in *Ainslee* v. *Martin*, 9 Mass. 454 (1813):

> "Protection and allegiance are reciprocal. The sovereign cannot refuse his protection to any subject, *nor discharge him from his allegiance against his consent:* and he will remain a subject, unless disfranchised as a punishment for some crime." (Italics added.)

It is, of course, accepted law that a person may give up, or "waive" constitutional rights. We concede that the right of citizenship granted and guaranteed by the Fourteenth Amendment would be among those constitutional rights which could be waived.[3] Else, 8 USC 800 would be meaningless. But it is equally accepted law that such waivers are not to be lightly implied and that before a waiver will be decreed, there must be the exercise of a free and intelligent choice [4] of at least the magnitude that this Court requires, for example, for a waiver of the right to counsel,[5] or

[3] "Expatriation is the voluntary *renunciation or abandonment* of nationality and allegiance." *Perkins* v. *Elg*, 307 U.S. 325, 334. (Italics added).

[4] Cf. the same rule even when one is *applying* for citizenship. *Moser* v. *United States*, 341 U.S. 41.

[5] *Johnson* v. *Zerbst*, 304 U.S. 459, 464; *Glasser* v. *United States*, 315 U.S. 60, 70; *Gibbs* v. *Burke*, 337 U.S. 773, 780; *Ureges* v. *Pa.*, 335 U.S. 437, 441.

the right to a jury trial,[6] or the right to freedom from unreasonable search and seizure,[7] or the privilege against self-incrimination.[8] Were it otherwise, Congress would then be taking away *without the consent of the citizen,* a right guaranteed him by the Constitution. Congress can no more do this in regard to citizenship than it can say that a man waives the right to counsel because he voluntarily pleads guilty when he does not know of the right to counsel in the first place (*Rice* v. *Olsen,* 324 U. S. 786).

In other words, because Congress had the right to and did recognize the right of a citizen to give up his citizenship when he *wanted* so to do, i. e. recognized the "right of expatriation", it had no power to twist that right into a liability and *impose* expatriation where the citizen did not want to give up his birthright.

C

Congress Has Here Exceeded Its Power

Similar legislation (8 USC 801(c) and (e)) to that involved here was declared unconstitutional by the United States District Court for the District of Hawaii in *Okimura* v. *Acheson,* 99 F. Supp. 587 and *Murata* v. *Acheson,* 99 F. Supp. 591. Direct appeals were taken to this court by the Government. This Court did not pass on the issue but remanded the cases to the District Court for specific findings as to the circumstances attending the military service and voting involved (342 U. S. 899 and 900). On remand, the court made the required findings and still held the sections

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[6] *Patton* v. *United States,* 281 U.S. 276, 312: *Hodges* v. *Easton,* 106 U.S. 408; *Aetna Ins. Co.* v. *Kennedy,* 301 U.S. 389, 393.

[7] *Johnson* v. *United States,* 333 U.S. 10, 13; *Amos* v. *United States,* 255 U.S. 313; *United States* v. *Di Re,* 332 U.S. 581.

[8] *Smith* v. *United States,* 337 U.S. 137, 150; *Quinn* v. *United States,* 349 U.S. 155.

unconstitutional (*Okimura* v. *Acheson*, 111 F. Sup. 303; *Murata* v. *Acheson*, 111 F. Supp. 306). That court adhered to these decisions in six later cases.[9] The Government pursued appeals in none of these cases. In the light of this fact, the *Okimura* and *Murata* cases take on additional stature.

In the second Okimura case, (111 F. Supp. 393) the court pointed out that it adhered to the rationale presented in the first case (99 F. Supp. 587). In that first case the court had said (99 F. Supp. at 589, 590):

> "May Congress divest a native born citizen of his birthright?
>
> ". . .
>
> "The point under discussion does not involve the unquestioned power of Congress to enact naturalization laws and to condition the retention of the status of citizenship so acquired. . . .
>
> ". . .
>
> "Too, it may be granted that a native citizen may lose that status by naturalization in a foreign country if the American national complies with the formalities with a specific, as distinguished from constructive, intention to cast off his United States citizenship.
>
> "Our concern is, rather, where in the Constitution is to be found any grant of power—specific or reasonably implied—by which Congress is authorized to divest an American born citizen of his nationality because, having also Japanese nationality, he served in the Japanese Army or voted in an election in Japan?
>
> "It is the view of this Court that while the Constitution gives the Congress plenary power over citizenship

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[9] *Terada* v. *Dulles*, 121 F. Supp. 6; *Uesu* v. *Dulles*, No. 1251; *Kikkawa* v. *Dulles*, No. 1256; *Hisamoto* v. *Dulles*, No. 1318; *Tamada* v. *Dulles*, 1263 and *Igarashi* v. *Dulles*, No. 1240 (the latter holding 8 USC 801(d) also invalid).

by *naturalization*, it leaves the Congress no power whatsoever to interfere with American citizenship by *birth*.

"The leading case on this subject is United States v. Wong Kim Ark, 1898, 169 U. S. 649, 18 S. Ct. 456, 42 L. Ed. 890. While some of its teachings seem to have been occasionally forgotten or whittled down in recent years, it has never been overruled.

". . .

"Section 800 of Title 8, United States Code Annotated, deals eloquently with the 'right' of expatriation, yet Section 801, applicable alike to native and naturalized citizens, attempts to spell out some ways in which that 'right' may become a liability.

"Congress may not thus declare that by performing such and such an act, in or out of the United States, a citizen will become expatriated. Congress has been given control over only one means of *creating* United States citizenship, namely by naturalization. It has the power to create and to condition that grant of citizenship; but is wholly devoid of any power to destroy citizenship by birth." [10]

We submit that this reasoning represents the correct law. We have previously called attention to the *Wong Kim Ark* case where this Court said (169 U. S. at 703):

"The 14th Amendment, while it leaves the power of Congress where it was before, in Congress, to regu-

[10] By footnote 1, pg. 590, the court made this significant statement:

"This Court is aware that there have been authoritative intimations to the contrary. See Mackenzie v. Hare, 239 U.S. 299, 311-312, 36 S. Ct. 106, 60 L. Ed. 297; Perkins v. Elg, 307 U.S. 325, 329, 59 S. Ct. 884, 83 L.Ed. 1320; and Kawakita v. United States, 9 Cir., 1951, 190 F. 2d 506. But only in the Mackenzie case was the precise Constitutional question here involved squarely presented, and there under vastly different facts."

late naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right of citizenship."

Moreover, a comparison between the language of the Constitution and the statute in question immediately demonstrates the patent invalidity of 8 USC 801(j). Thus:

14th Amendment, U. S. Constitution	*8 U. S. C. 801*
"All persons born or naturalized in the United States . . . are citizens of the United States . . ."	"A person who is a national of the United States shall lose his nationality by: . . ."

Nor does the declaration of Congress in 8 U. S. C. 800 change the situation. Regardless of what may be the rule where an American citizen actually *renounces* his citizenship, there is no basis for saying that Congress has the right to deprive him of his citizenship by the doing of acts other than actual renunciation, simply because Congress does not like him. The Constitution gives Congress no such right; that body cannot, by a declaration, clothe itself with such power.

In its brief in opposition to the petition, the government argues (Pg. 9) that the only check on Congress' power to decree involuntary expatriation is the due process clause of the Fifth Amendment. As will be seen, we dispute this point. But even if so, Congress has overstepped its bounds here. If going or remaining abroad to evade service gives ground to impose expatriation, why does not draft evasion of a person who remains in the United States furnish the same ground? And, logically speaking, why does not violation of any war-time law, or any law of the United

States, render the person "unworthy of citizenship" and, hence, subject to involuntary expatriation? The very posing of these questions, we submit, demonstrates the unreasonableness of the section here in question.

The suggestion that the only check on Congress' power to take away Constitutional rights is the Due Process clause, is novel and sweeping doctrine. Following such reasoning, it would logically ensue that, subject only to the Due Process clause of the Fifth Amendment, Congress has the power to take away or nullify any right or status which the Constitution gives. Some examples by way of rhetorical questions will demonstrate the fallacy of such a position:

1. Article I, Section 1, says that Congress shall consist of a Senate and a House of Representatives. May Congress decree that hereafter Congress shall consist of only a Senate?

2. Article I, Section 2, subsection 1, provides that members of the House of Representatives shall be chosen every second year. May Congress provide that hereafter members of the House shall be elected every third year?

3. Article I, Section 2, subsection 4, provides that where there is a vacancy in the House of Representatives from any state, the executive of that state shall fill the vacancy. May Congress provide that in such an instance the executive of that state shall not have the right but that Congress itself shall fill the vacancy?

4. Article I, Section 3, subsection 6, provides that the Senate shall have the sole power to try all impeachments. May Congress provide that the power to try impeachments shall henceforth be given to the House?

5. Article I, Section 3, subsection 7, provides that the judgment in impeachment shall extend only to removal from office and disqualification. May Congress enact that a judgment of impeachment may provide for sending the officer to jail?

6. Article I, Section 6, subsection 1, provides that a Senator or Representative for a speech or debate in either house shall not be questioned in any other place. May Congress provide that a Representative could be called to answer for a speech in the House before a Federal Grand Jury?

7. Article II, Section 1, subsection 1, provides that the President shall hold office for four years. May Congress provide that henceforth he shall only hold office for three years?

8. Article II, Section 2, Clause 1, provides, inter alia, that the President shall be the Commander-in-Chief of the Army and Navy, and that he shall have the power to grant pardons save in cases of impeachment. May Congress provide that he shall lose his command or his power to pardon if he engages in acts of which Congress disapproves?

9. Article III, Section 1, provides that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may establish. May Congress provide that the Supreme Court shall no longer have judicial power if it acts in a manner displeasing to Congress?

10. Article III, Section 3, Clause 1, provides that Congress may admit new states to the union. May Congress provide that a state once admitted into the union can be ousted therefrom?

11. Article VI, Section 3, provides that no religious test shall be required as a qualification for an office of public trust. May Congress provide that such a qualification be required?

12. The Third Amendment provides that no soldier shall, in time of peace, be quartered in any house without the consent of the owner. May Congress provide that, in time of peace, soldiers may be quartered in a house without the owner's consent?

13. The XVIIth Amendment provides that each state shall have two Senators. May Congress provide that a particular bad acting state shall have one or no Senators?

Further examples could, of course, be cited. The point is that citizenship is a specific right which the Constitution and not Congress gives. How, then, can Congress undo what the Constitution does?

Moreover, if Congress can strip away citizenship from persons constitutionally endowed with that status, why cannot it take away lesser rights which go to make up that bundle which we call American Citizenship, such as: the right to trial by jury, to be represented by counsel, to freedom of spech, etc. A familiar maxim is that the greater includes the lesser. Therefore, if Congress can take away the whole of citizenship, it should logically follow that it can take away any part thereof.[11] We believe Congress has no power in either instance. Cf. *Dawson's Lessee* v. *Godfrey,* 4 Cranch (U. S.) 321, 323: "(A) man can never put off his allegiance, or be deprived of the benefits of it but for a crime."

Both on its face and from its history, Congress, by the legislation at bar, is punishing in this extreme way, for violation of law. In so doing Congress has acted arbitrarily as well as beyond its authority. We also submit that in trying to exercise such power, looking as it does, towards eventual banishment or exile, here against a person for violating the law, Congress has imposed cruel and unusual punishment contrary to the Eighth Amendment. (Cf. *Fong Yue Ting* v. *United States,* 149 U. S. 698, 730; and see Frankfurter, concurring, in *American Communications Association* v. *Douds,* 339 U. S. 382, 419.)

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[11] The fact that these rights may also belong to aliens does not detract from the point. They certainly belong to citizens. See *Galvan* v. *Press,* 347 U.S. 522, for an example of where aliens have, if anything, less rights than citizens.

II

ction 401(j) of the Nationality Act of 1940 as Amended, Should Not Be Construed to Impose Expatriation under the Facts of This Case

The facts of this case must ever be borne in mind. Petiner was taken to Mexico when he was less than two years l (R. 9). He lived there with his family until he was 21, ien he came back to the United States. When he was ten ars old, petitioner's father died (R. 13) and petitioner as forced to quit school and go to work to support his mily (*Ibid*). Petitioner was the eldest child of a family six children (R. 12). The record in this case is that petiner was not a national or citizen of Mexico (R. 1, 3). e registered for military service in Mexico (R. 16), a coun- with which we were allied during the War. (See Agreent Between the United States and Mexico relating to ilitary Service; 57 Stat. 973, 976).

Section 401(j) of the 1940 Nationality Act was passed on ptember 27, 1944 (58 Stat. 746) when plaintiff was still minor and still working to support his family.

The statute being penal [12] in nature and effecting a forfiture, it is to be strictly construed. *Guessefeldt* v. *McGrath*, 342 U. S. 308, 319; *Federal Communications Commission* v. *American Broadcasting Company*, 347 U. S. 284, 296). Especially is this so where otherwise a grave constitutional issue would be raised. (*Guessefeldt* v. *McGrath*, *supra*). It goes without saying, that this should be the se in an expatriation statute which seeks to strip away "precious (a) right" (*Schneiderman* v. *United States*, 0 U. S. 118, 125) as United States citizenship. In such case "the facts and the law should be construed as far

[12] Cf. Statement by the trial court, (R. 21): "The purpose . . . was penalize those who would not participate in the war effort."

as is reasonably possible in favor of the citizen" (*Ibid,* at page 122).

The statute was aimed at an entirely different factual problem than the one presented here. It was aimed at those persons who, during World War II, *left* the United States for the purpose of evading military service and, of course, thereafter remained away for that purpose. The section was enacted at the request of the Attorney General in a letter dated February 16, 1944 addressed to Senator Russell, Chairman of the Senate Committee on Immigration (S. Rept. 1075 and H. Rept. 1229, 78th Cong., 2d Sess.). In that letter, the Attorney General said (pgs. 2, above cited reports):

> "The files of this Department disclose that at the present time there are many citizens of the United States who have left this country for the purpose of escaping service in the armed forces. While such persons are liable to prosecution for violation of the Selective Service and Training Act of 1940, if and when they return to this country, it would seem proper that in addition they should lose their United States citizenship. . . .
>
> "Accordingly, I recommend the enactment of legislation which would provide (for expatriation of citizens and exclusion of aliens."

The legislation, therefore, was aimed at penalizing those citizens who were leaving the country for the interdicted purpose and not at those, who, like petitioner, had been taken by their parents for reasons wholly unconnected with military service and who were residing in an ally country and in which country they were performing their military obligation.[13]

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[13] Petitioner registered for Mexican military service in Mexico in 1942 (R. 16).

When Congress passed the 1940 Nationality Act in which Section 401, giving various grounds for expatriation, was included, it repealed (54 Stat. 1172; 8 USC 904) previous legislation enacted during World War I (37 Stat. 356) providing for the expatriation of persons who went beyond the limits of the United States with intent to avoid the draft. Congress, thus, was content to have the sole sanction against draft evasion of the 1940 Selective Service Act, which it passed the same year (8 USC Appx. 317, 54 Stat. 897), rest with the penal provisions of the Selective Service Act (8 USC Appx. 311). If, from no other source, Congress at least knew from the Attorney General's letter above referred to, that citizens had left and were *leaving* the United States for the purposes of draft evasion and so they drafted Section 401(j) to meet *that practice.*

Support for this thesis is seen from the debate on the bill (H. R. 4257, 78th Con.) in both houses of Congress. Thus, Congressman Sabbath said (90 Cong. Rec. 3256):

> "It aims to preclude from reentry into the United States of a large number of men who have *left this country for the purpose* of avoiding service in the United States armed services." (Italics added.)

Congressman Fish stated (90 Cong. Rec. 3260):

> "This is aimed at the draft dodgers who *left* America to go to some foreign nation *to keep out of the draft.*" (Italics added.)

Congressman Dickstein, who introduced the bill, said (90 Cong. Rec. 3261):

> "I would classify this piece of legislation as a bill to denaturalize and denationalize all draft dodgers who *left this country knowing* that there was a possibility *that they might be drafted in this war* and that they

might have to serve in the armed forces or the marines and in an effort to get out of such service." (Italics added.)

And, again (90 Cong. Rec. 7725, 7726):

"The purpose of the bill is to keep out of the country certain people who evaded war service and *left this country after Pearl Harbor,* especially most of them having left after the declaration by the President and the Congress of a state of war." (Italics added.)

Congressman Mason said (90 Cong. Rec. 3262):

"This is not a Member of Congress who does not agree completely with the purpose of the bill to denaturalize, I would put it, or expatriate any citizen who dodges the draft by *skipping out of the country.*" (Italics added)

On the Senate side, Senator Russell, Chairman of the Senate Committee on Immigration, said (90 Cong. Rec. 7628):

"This bill provides that any person who is a national of the United States, or an American citizen, and who *in time of national stress departed* from the United States to another country to avoid serving his country, shall be deprived of his nationality." (Italics added.)

That Congress did not intend the legislation to cover a person such as petitioner is also seen from the fact that none of the Presidential Proclamations setting forth the times at which registration was required called for an American citizen living abroad to return to the United States. Indeed, it was not until Proclamation No. 2597,

October 23, 1943 (50 USCA (1946 Ed.) Appx. 302, note) that there was any requirement for an American living abroad to even register for military service. And that proclamation made provision for the registration to be effected abroad with no requirement for returning to the United States. The previous proclamations (Nos. 2425, 2486, 2535; 50 USCA (1946 Ed.) Appx. 302, note) simply provided for registration within a certain time period after those persons returned to the United States, but there was no requirement that they return within a certain period or at all.

Accordingly, especially in view of the Attorney General's letter and the Congressional debate, it is seen that the section should not, and was not intended to, be interpreted to cover the case now before the court.

Further support for this argument is also seen from the January 22, 1943 Agreement Between the United States and Mexico Respecting Military Service (57 Stat. 973-977). In that Agreement, entered into between the two countries pursuant to "the mutual desire of our respective countries to unite their efforts as members of the United Nations in prosecuting the war and achieving victory" (57 Stat. at 977), each country agreed that (Para. I; 57 Stat. at 975) nationals of either country resident within the territory of the other may be registered and inducted into the armed forces of their residence on the same conditions as nationals thereof. It was also agreed (Para. IX; 57 Stat. at 976) that:

> "Nationals of each country who have been registered for or inducted into the Army of the other country in accordance with the military service laws of the latter and who have not declared their intention to acquire the citizenship of the country in which they reside shall upon being designated by the country of which they are nationals and with their consent be released for mili-

tary service in its forces provided that this has no prejudicial effect on the common war effort. . . ."

In other words, we agreed to, and recognized, the fact that United States nationals living in Mexico could and would be registered for military service in that country in accordance with its laws and that this practice was in accordance with our desires to prosecute the war and achieve victory.

It is not necessary to decide whether Section 401(j), passed in 1944, supersedes and takes precedence over the 1943 agreement between the two countries (cf. *Chae Chan Ping* v. *United States*, 130 U. S. 581) because, if at all possible the two should be construed so as to give effect to both (*Lem Moon Sing* v. *United States*, 158 U. S. 538) without doing violence to either.

Such mutually effectuating construction is possible here, especially when a contrary construction would raise grave constitutional questions and would attribute to Congress an unnecessary inconsistency.

Congress must be deemed to have known, when it passed Section 401(j), of the agreement between this country and Mexico. It would be attributing to Congress a purpose not warranted by the evil at which the Attorney General's letter was aimed, to visit the extreme penalty of expatriation upon persons, such as petitioner, who were living abroad and performing their military duty there in an ally country.

Petitioner registered under the Mexican military service laws in 1942 (R. 16). There is no showing in the record here that petitioner had declared his intention of acquiring citizenship in Mexico, or that the United States requested of Mexico, as provided by Paragraph IX of the Agreement, that petitioner be released for military service in our forces. Accordingly Section 401(j) should not be construed to encompass petitioner, who is an obvious beneficiary, if you

will, or subject of the mutual agreement between the two countries.

Moreover, it will be noticed that Paragraph IX of the Agreement provides for the release of a national of one country resident in the other who has registered for or been inducted into the Army of the other country only with the *consent* of the registrant or inductee. In other words, Congress knew, when it passed 401(j) of the right, so to speak, of a United States National in Mexico, who, like petitioner, had registered for military service in Mexico, to refuse to come back for military service in the United States, or, if you will, to remain away from the United States, under these special circumstances, "for the purpose of evading or avoiding training and service in the land or naval forces of the United States." The Agreement was entered into, obviously, to avoid confusion and to provide for orderly treatment of the military service obligations of nationals of the two countries residing in the other.

With such knowledge before Congress, Section 401(j) should not be construed to include the facts of this case.

As noted, even Respondents agree (Br. in Opp. to Cert. pg. 9) that if Congress does have the power to impose involuntary expatriation, that power cannot be exercised arbitrarily and is subject to the Due Process Clause of the Fifth Amendment.[14] We submit that to construe the statute to compel expatriation under the circumstances of this case would be to arbitrarily deprive petitioner of his nationality.

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[14] Cf. Article 15(2) of the Universal Declaration of Human Rights (adopted by the General Assembly of the United Nations, Dec. 10, 1948): "No one shall be arbitrarily deprived of his nationality . . ."

III

The Government Did Not Produce Evidence Meeting Standard of Proof Required

The Government concedes (Br. in Opposition to Pet. 1, that since petitioner was born a citizen of the United Stat the burden is on the Government to prove expatriation evidence that is clear, unequivocal and convincing. But Government's burden is more than this. The famil cases [15] make it clear that there can be no ambiguity, tha mere preponderance of evidence is not sufficient, and that evidence must be of such solidity as to leave "no troubl doubt."

Moreover, since it is the Government's burden to est lish the expatriation, this burden, and by the same deg of proof, must be carried as to all elements of the cas This means that the Government must thus prove, by t high standard of proof, not only that petitioner remaine outside the United States for the purpose interdicted by statute but also that he did so voluntarily. This, becau there can be no expatriation unless the conduct is vol tary.[18]

We submit that the Government's proof fails as to b these issues.

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[15] E.g. *Perkins* v. *Elg*, 307 U.S. 325, 337; *Schneiderman* v. *Un States*, 320 U.S. 118, 125; *Baumgartner* v. *United States*, 332 U.S. 670.

[16] *Augello* v. *Dulles*, 220 F. 2d 344, 345 (CA 2 1955); *Lehmann Acheson*, 206 F. 2d 596, 598 (CA 3 1953); *Schioler* v. *Secretary of St* 175 F. 2d 402, 403 (CA 7 1949).

[17] There can be no contention that petitioner departed the Un States for the purpose prohibited by the statute.

[18] *Perkins* v. *Elg*, 307 U.S. 325; *Dos Reis* v. *Nicolls*, 161 F. 2d (CCA 1 1947); *Fukumoto* v. *Dulles*, 216 F. 2d 553, (CA 9 1954); ca cited *supra*, f.n. 16. See also *Mandoli* v. *Acheson*, 344 U.S. 133.

First, as to the proof that petitioner remained outside the United States from September 27, 1944 until April 23, 1946 (R. 3; affirmative defense) for the purpose of evading or avoiding service in the land or naval forces of the United States.

The proof on this issue consists solely of testimony by the immigration officers [19] that on previous occasions petitioner was asked and he answered affirmatively certain questions, including leading questions such as (R. 19, 20): "Do you admit that you remained outside the jurisdiction of the United States from September, 1944 until April 23, 1946 for the purpose of evading or avoiding training and service in the land and naval forces of the United States?" [20] This kind of evidence is the only evidence in the case. Of course, the mere fact that petitioner may have *said* on other occasions that he remained outside the United States for the interdicted purpose, does not make or establish that to be *the fact*. It is only by inference from those previous statements that the fact can be concluded. In other words, the Government's entire case rests upon *inference*. We submit that this is indeed a slender reed upon which to rest in order to "reduce (petitioner) to the status of alien from that of citizen", (*Baumgartner* v. *United States*, 332 U. S. 665, 670) rather than charge him with crime for violation of the Selective Service Act (50 USC Appx. 311).

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[19] Where petitioner was not represented by counsel. (Exh. A; R. 27).

[20] The record on this is confused and not clear. For example, the question just put is supposed to have been posed by the immigration officers in 1947 (R. 19). Compare this with a question that is supposed to have been asked of him in 1952 (R. 24) and his answer thereto (R. 25, 26):

"Q. At your hearing before the Board of Special Inquiry at El Paso, Texas in 1947 and 1950, did you admit that you remained in Mexico during the war for the purpose of evading or avoiding training or service in the army?

"A. No."

Moreover, the circumstances under which these statements were made must be considered. Thus, they were made by a young man who had lived all his life in Mexico, had to quit school at the age of 10 to go to work (R. 13) before officers who had omnipotent authority over him, and through an interpreter (R. 19).[21] In cases involving almost identical factual situations, likewise involving boys born here who were taken to Mexico at an early age, lived there all their lives, came to the United States, made statements before immigration officials and denied them at the trial, other courts have previously noted the unrealistic, excitable circumstances under which such statements are obtained and the desires of persons such as petitioner to please the officers examining them.[22] In the *Nieto* case, the court said (108 F. Supp. at 154):

> "I am not committed to the idea that an admission, statement, or confession made before such Boards are infallible, or indeed, that they always represent the truth. Especially do I doubt their force when the parties are poor, illiterate Mexicans on the one hand and experienced Government officers on the other hand; the one unrepresented and untrained; the other well represented and well trained.
>
> ". . . I have had enough experience with interpreters in the courts to know that often, on crucial points, there is a disagreement between interpreters as to what a witness said, or as to the meaning of the answers he gave. I have also noted that seldom are answers given by a Mexican peon in the detailed and

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[21] We have already noted that at least one interpreter used in these proceedings was incompetent. (R. 11).

[22] *Ponce* v. *McGrath*, 91 F. Supp. 23, 24 (DC SD Cal. 1950); *Nieto* v. *McGrath*, 108 F. Supp. 150, 154 (DC SD Tex. 1951); *Martinez* v. *McGrath*, 108 F. Supp. 155, 156 (DC SD Tex. 1952).

apparently voluntary manner in which plaintiff is reported to have answered. Uniformly the questions must be leading. Even then, generally there is considerable jabbering back and forth between the interpreter and the witness, to get a simple answer to a simple question."

In the *Ponce* case, the court said (91 F. Supp. at 24):

"The court is left to draw on its experience and general understanding, and perhaps intuition, in dealing with persons of humble birth reared in environments lacking educational and social advantages, to determine the emotional reactions and probable truth of answers made by such inexperienced persons of immature age when suddenly thrust into a situation which causes them great apprehension in ignorance of the purpose and possible outcome of testimony which they may give in answer to interrogations which may be strange to them.

"Frequently have I learned from irrefutable proof submitted at a later time, that answers made under intense excitement and fear [23] and in an apparent desire to meet agreement and satisfy the questioner and have the matter over with, were utterly false; the falsity of which later was fully realized by the answering person but unexplainable by him when confronted with some of his answers.

"The plaintiff could not have understood the meaning of many of the words used in the hearing, many of which he probably had never heard before, either in Mexican or in English. He had no counsel and no money with which to have employed one had he

[23] Cf. petitioner's testimony here: "They scared me." (R. 14).

known the need for counsel, nor had he a friend present during most of the hearing.

"In handling numerous Chinese immigration cases, I have learned that quite a few Immigration Officers are tough, rough, and designing in their methods of examination, arising, no doubt, from many cases in which they have been fraudulently imposed upon, so that any case which causes the least suspicion in any one of their immediate group, is processed in a manner calculated to win a complete victory over the suspect in the record of testimony procured."

Petitioner does not suggest that the record in this case supports a charge of overreaching by the Immigration officers.[24] The point is, however, that in this type of case, where the Government's evidence must be "indeed overwhelming" (*Meyer* v. *United States*, 141 F. 2d 827 (CCA 5 1944), the evidence relied upon by the Government to prove that petitioner remained away from the United States for the interdicted purpose is simply not sufficient to meet the required standard.

True, the cases just discussed are District Court cases. But the rationale of their reasoning cannot be gainsaid.

Next, as to the Government's proof that, if petitioner did remain away for the interdicted purpose, he did so voluntarily.

On this issue, the Government presented no proof. Indeed, there is evidence just the other way. The very evidence relied upon by the Government gives reason to believe that petitioner remained in Mexico by reason of parental compulsion (R. 19, 26). This would certainly be sufficient to show involuntary action up to July 21, 1945,

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[24] To the same effect, the court's statement in the *Ponce* case. (91 F. Supp. at 25).

when petitioner came of age. Nine months after he came of age, petitioner came to the United States. That is not an unreasonable length of time for a person to pull up roots, leave his mother and brothers and sisters and come to establish a new life in a different country.[25] It is immaterial whether this fact is sufficient proof *to establish* that petitioner's remaining away was *involuntary*. The point is that, absent positive proof by the Government in this type of case, it casts sufficient doubt on the Government's case to establish that the remaining away for the interdicted purpose was voluntary. Absent such solidity of proof, there can be no expatriation.

Conclusion

The judgment of the court below should be reversed and petitioner declared to be a national and citizen of the United States.

Respectfully submitted,

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[25] Particularly is this so because the only period of time during which Section 401(j) could apply here is between July 21, 1945, the day petitioner became 21, and April 23, 1946, the day he came to the United States. By virtue of Section 403(b) of the 1940 Nationality Act (8 USC 803(b)) petitioner could not expatriate himself under Section 401(j) until he became 21. (Cf. *McGrath* v. *Abo*, 186 F. 2d 766 (CA 9 1951)). It then becomes a neat question of proof as to how much remaining outside the United States is necessary before Section 401(j) can come into play.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 111

DANIEL CASTANEDA GONZALES, PETITIONER

v.

H. R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION OF DISTRICT NO. 16, ET AL.

ON WRIT OF CERITORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the Court of Appeals (R. 34–38) is reported at 215 F. 2d 955.

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1954 (R. 38). On December 7, 1954, the time for filing a petition for a writ of certiorari was extended, by order of Mr. Justice Douglas, to and including February 5, 1955 (R. 38). The petition was filed on February 4, 1955, and was granted on May 31,

1955 (R. 39). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court's holding that petitioner had voluntarily remained outside the jurisdiction of the United States in order to evade military service during World War II is supported by sufficient evidence.

2. Whether Section 401 (j) of the Nationality Act of 1940, providing for the expatriation of American citizens who depart from or remain outside the jurisdiction of the United States in time of war for the purpose of evading service in the armed services, applies to an American who had been living abroad for many years when he attained the age of 18 in 1942 and registered for Mexican service in that year, and who did not return to this country until 1946.

3. Whether Congress has the constitutional power to provide, as it did in Section 401 (j) of the Nationality Act, for the expatriation of native-born citizens who, in time of war, voluntarily remain outside the jurisdiction of the United States for the purpose of evading service in its armed forces.

STATUTE INVOLVED

Subsection (j) of Section 401 of the Nationality Act of 1940, 54 Stat. 1137, as amended by the Act

of September 27, 1944, 58 Stat. 746 (8 U. S. C. (1946 ed.) 801 (j)), provided:[1]

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> (j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States. * * *

The full text of Section 401 of the Nationality Act is set forth in the Appendix, *infra*, pp. 64–66.

STATEMENT

Petitioner seeks reversal of the judgment of the Court of Appeals for the Ninth Circuit (R. 38), affirming the judgment of the District Court for the Southern District of California dismissing petitioner's action for a declaratory judgment under Section 503 of the Nationality Act of 1940 (R. 5–6). Petitioner sought to be declared a citizen of the United States (R. 1–2), but the court found that he had expatriated himself under Section 401 (j) of the 1940 Act "by voluntarily remaining outside the jurisdiction of the United States * * * for the purpose of evading or avoid-

[1] The provision is now incorporated in section 349 of the Immigration and Nationality Act of 1952, 66 Stat. 267, 8 U. S. C. 1481 (a) (10).

ing training and service in the land or naval forces of the United States" (R. 5–6).

The evidence before the District Court reveals that petitioner was born in the United States on July 21, 1924 (R. 7). When he was less than two years of age, he was taken by his parents to reside in Favela, Chihuahua, Mexico, approximately 350 or 400 miles from El Paso (R. 7–8). Petitioner's father died when petitioner was about 10 or 11 years of age (R. 8). His mother told petitioner, when he was about 12, of his birth in the United States (R. 8). He did not attend school after his father's death (R. 13). He worked for his mother for about 10 years, helping to support her and the five younger brothers and sisters (R. 12). His work consisted of planting and picking corn and beans at a sort of ranch 20 kilometers from town (R. 13). He first desired to return to the United States in 1937 to attend a mechanical course, but his "mother wouldn't let [him]" (R. 17). In 1942, he registered for military service in Mexico (R. 16).

On April 23, 1946, petitioner was admitted to the United States as a native-born citizen (R. 8, 12), and at this time he registered for selective service with the United States Consul (R. 12). Upon a later return to Mexico and attempt to reenter the United States in 1947, petitioner was excluded, the Board of Special Inquiry of the Immigration and Naturalization Service finding that he had lost his citizenship by reason of

remaining outside the jurisdiction of the United States until 1946 for the purpose of avoiding military service (R. 8, 19).

The transcripts of petitioner's testimony before the Board of Special Inquiry on October 2, 1947, and upon subsequent occasions when petitioner was excluded (in 1950 and 1952), were placed in evidence upon stipulation of counsel for the government and petitioner that the proper officers would testify to their accuracy (R. 24, 26–27).[2] Portions of the transcript of October 2, 1947, containing petitioner's testimony, which were read into the record at the trial in the District Court, included the following statements by him: He admitted that he learned in 1942 that the United States was at war (R. 14). In 1944, he learned from some United States citizens living in Mexico that he was required to register at the United States consulate for military service (R. 14–15), but he did not want to register as he was "afraid of military service during the war" (R. 15). He would have returned to the United States in 1942 but his mother "would not permit [him] to do so", and he would have come to the United States in 1944 or 1945 had it not been for "the war" and "the requirement to register" (R. 17–18). He admitted that he remained outside of the jurisdiction of the United States from Sep-

[2] The transcripts, constituting Exhibit A of the record before the District Court, are not reproduced in the printed record but have been lodged with the Clerk of this Court.

tember 1944 until April 23, 1946, for the purpose of evading military service (R. 19–20).

The transcript of a second hearing on October 5, 1950, showed that the 1947 statements were read to petitioner and he stated: "I was denied admission because I was afraid but now I am willing to serve in the armed forces" (R. 19). He further explained his mother's influence as follows (R. 19):

> Q. Why was your mother willing for you to come to the United States in 1946 but unwilling for you to come to the United States in 1943, 1944 or 1945?
>
> A. In 1946 my mother was not afraid that I would be taken off to war.

In another hearing held in California on January 9, 1952, pursuant to a further attempt of petitioner to enter the United States (R. 24–25), he again admitted his purpose of evading selective service, as follows (R. 24):

> Q. In your hearing before boards of special inquiry at El Paso, Texas, in 1947 and 1950, did you admit that you had remained in Mexico during World War II for the purpose of evading or avoiding training or service in the armed forces of the United States during time of war and were you excluded as an alien immigrant not in possession of an unexpired immigration visa and passport?
>
> A. Yes, sir, I did, and they did tell me that I needed to get a passport and immi-

gration papers to enter the United States. The only thing was I did not do so but entered without.

He also testified as follows (R. 26):

Q. Was fear of military service in time of war the only reason that you did not register for United States military training and service prior to 1946?

A. The only true thing is and the only one I give now is my mother's fear of military service for me. I could have registered for it at Chihuahua, Mexico. I went there two or three times, the capitol of the state. It was because of the fear of my mother that I did not do so before 1946.

* * * * *

Q. Were you aware that you could have registered for the United States military service in Mexico prior to 1946 had you desired to do so?

A. Yes, sir. I later thought of registering for it in Chihuahua, Mexico where I went a few times, but as my mother did not wish me to do so I did not do so.

At the District Court trial, in 1953, petitioner asserted that he did not make the admissions recorded in the transcripts of his three prior appearances before the immigration authorities (R. 14–20, 26), and that certain of such admissions represented confusion in utterance on his part (R. 14). He then explained his remaining in Mexico until 1946 by stating that his mother did not "let" him return to the United States

(R. 9, 18), and "did not permit [him] to leave the house" (R. 14, 16–17, 19, 26); and that his mother mentioned nothing about fear of military service to him (R. 26). He testified at the trial that he came to the United States in 1946 to establish his rights as a citizen, and because there was insufficient room in his mother's accommodations in Mexico (R. 10–11); that he did not know until 1946 that the United States had been at war (R. 13–14, 16); that he read no newspapers until 1946 (R. 13); and that he knew no United States citizens in Mexico (R. 15).

The trial judge dismissed petitioner's action for a declaratory judgment (R. 5–6), stating[3] that he did not believe the testimony which petitioner gave before him, notably the statements that petitioner had not known of the war and his responsibility in connection with it (R. 32), or the testimony that petitioner could not return to the United States before 1946 because his mother would not let him out of the house (R. 33). The judge appraised petitioner as intelligent (R. 32, 34) and "a pretty bright young fellow" (R. 32), "not what you call a peon by any means" (R. 32). He evaluated the consistent admissions of petitioner at the three administrative hearings as more accurate than the testimony "after [petitioner] consulted counsel and found out what his legal rights were" (R. 33). Recognizing that, upon petitioner's establishing his original status

[3] Formal findings were waived. R. 34.

as a citizen by birth, the burden was upon the government to prove the facts by reason of which citizenship was lost (R. 21), the judge concluded that petitioner's testimony in the administrative proceedings not only impeached his evidence at the trial but constituted affirmative testimony (R. 29).[4]

The Court of Appeals affirmed (R. 38), holding that the District Court's finding was "overwhelmingly" supported by the testimony in the administrative proceedings (R. 36). The court further held the expatriation statute constitutional (R. 36).

SUMMARY OF ARGUMENT

I

The facts are undisputed that petitioner, a citizen of the United States by birth, residing in Mexico since infancy, was informed of his citizenship and intended at an early age to return to the United States, but that when he became 18 years of age in 1942 he registered for Mexican military service, and he did not register for service in the armed forces of the United States until April 1946—nine months after the close of hostilities in the summer of 1945—when he first sought to re-enter the United States.

[4] The judge distinguished a case in which he had himself ruled otherwise, as having involved a person who was "away in the depths of Mexico and * * * didn't appreciate or have an opportunity to recognize his obligations" (R. 33).

With respect to the motivation of petitioner's failure to return to the United States until 1946, the transcripts of separate hearings before Boards of Inquiry of the Immigration and Naturalization Service in 1947, 1950, and 1952, produced in evidence at the District Court trial, embodied consistent and detailed admissions by petitioner that he knew of the entry of the United States into the war as early as 1942 and that he knew in 1944, from contacts with people coming from the United States, that he was required to register, but that his mother's fears for him during actual warfare and his own desire to evade military service until after the war was over kept him in Mexico until 1946.

At the trial in 1953, petitioner denied that he had made the admissions appearing in the three transcripts and stated that he had remained in Mexico because his mother forbade his leaving her, and that he had worked on a farm and had not known of the involvement of the United States in the war until 1946 when some workers crossing the border informed him.

The trial judge, weighing the evidence, disbelieved petitioner's 1953 explanation. He appraised petitioner as an intelligent and bright young man and considered entirely implausible petitioner's protestations of lack of knowledge of the war and his ascribing of the delay in return to his mother's orders.

On the evidence, the judge was clearly entitled to disbelieve petitioner's trial testimony and to find that he voluntarily removed outside of the United States in order to evade the draft. The earlier transcripts not only impeached the trial testimony but also—being admissions by a *party* to the cause—constituted proper substantive evidence. *Miles* v. *United States,* 103 U. S. 304, 308–309, 311; 4 Wigmore, *Evidence* (3d ed.) § 1048. Petitioner's repeated and consistent earlier admissions, in the context of the indisputable chronology of events and acts, constitute clear, unequivocal, and convincing evidence upholding the finding that he voluntarily remained in Mexico until after the war in order to evade his obligation to register for service in the armed forces of the United States.

II

On the findings of the courts below, petitioner was expatriated under Section 401 (j) of the Nationality Act of 1940 (as added in 1944).

A. Petitioner argues, for the first time in his brief on the merits, that Section 401 (j) applies only to draft-evaders who left the country in order to avoid service, and does not apply to a person like himself who was living abroad and remained there with a like purpose. But the Act clearly covers, in precise terms, those "departing from" *or* "remaining outside" "the jurisdiction of the United States" "for the purpose of evad-

ing *or* avoiding training and service" (emphasis added). And there would be no reason for Congress to distinguish between the American who departs to evade service and he who, happening to live abroad, deliberately remains there for the same end. By intentionally choosing to remain in Mexico and not to register or return, petitioner deprived the United States of the possibility of his services just as effectively as if he had fled there.

B. Also raised for the first time in the brief on the merits is the contention that the United States-Mexico Executive Agreement of January 22, 1943, relating to the nationals of either country in the armed forces of the other, excused him from American service since he claims to have registered for Mexican service in 1942, and asserts that the Agreement contemplated that such persons could be transferred to the armed forces of the other country only with their consent.

The short answer is that this Agreement establishes the rights of the two countries *inter se* and does not confer any rights on individuals *against their own country;* insofar as petitioner was concerned as an American citizen, the United States gave up no claim by the Agreement and he acquired no rights as against this country. The only rights he may have acquired were against Mexico. This is clearly illustrated by the fact that when the United States did begin (in the latter part of 1943) to call for service Americans resident

abroad, no exception was made for those living in Mexico or registered under Mexican law. In any event, nothing in the Executive Agreement even remotely suggests that petitioner would be or was excused from *registering* under the United States selective service laws, and this he failed to do for the specific purpose of evading service.

Moreover, Section 401 (j) does not, expressly or impliedly, excuse Americans from the effect of draft evasion or avoidance because of registration for foreign service. In contrast, Section 401 (c) of the Nationality Act, dealing with dual nationals entering or serving in the armed forces of a foreign state of which they are also nationals, provides for expatriation unless such service has been "expressly authorized by the laws of the United States." If there were a conflict, Section 401 (j) would, of course, prevail over the earlier Agreement, but, as we have shown, on a proper reading of the Agreement there is no clash since it does not affect the obligations and duties of Americans resident in Mexico toward this country.

C. Likewise suggested for the first time in the brief on the merits is the argument that Section 401 (j) could not apply to petitioner before he became 21 in July 1945. But the 1940 Nationality Act established 18 as the age at which other comparable acts of expatriation could be committed. The only reason that this general age limit was not expressly extended to Section 401

(j) is that the latter provision obviously contains its own built-in age limit—the age at which one becomes subject, in a particular war or during a particular emergency, to draft or selective service legislation.

III

Congress acted within its constitutional powers in prescribing expatriation for draft-evaders remaining outside the jurisdiction of the United States in time of war.

A. The power to expatriate is an implied attribute of sovereignty with which the United States is invested as a nation, even though such power is not expressly stated in the Constitution. *Mackenzie* v. *Hare,* 239 U. S. 299. The authority to exercise that power is not restricted merely to the recognition of the subjective intent of a citizen to expatriate himself. Congress may—on grounds which are reasonable, giving due consideration to the precious character of American citizenship—fix the conditions which result in loss of nationality, regardless of the subjective intent of the individual citizen who performs the expatriating act. While the courts have found that Congress intended the act which results in expatriation to be a voluntary one, they have expressly held that the person voluntarily performing the specified act loses his nationality by the performance of such act, irrespective of his knowledge or intent that he would thereby renounce United States nationality. E. g. *Sav-*

orgnan v. *United States,* 338 U. S. 491. The consistent current of responsible judicial decision in this country has recognized the power of Congress to impose loss of nationality on citizens performing certain acts voluntarily.

B. Prescribing loss of nationality for those who remain out of the country to avoid military service in wartime is a reasonable exercise of the power of Congress, in the national interest, to fix the conditions of expatriation. Such persons, by their own conduct, place themselves in a class significantly different from other citizens, different even from other groups of evaders for whom the ordinary criminal sanctions are available. They also present a problem in international relations since, so far as other countries are concerned, they remain United States citizens, while, so far as this nation is concerned, they have refused to meet the obligations of citizenship.

Ever since the Civil War, the United States has felt the need for legislation of the type here involved. A statute in force from 1865 to 1940 prescribed forfeiture of "rights of citizenship" for those who left the district of registration to evade the draft, apparently even if they did not leave the country. The constitutionality of that statute has consistently been assumed by the courts and it was administratively treated as a full expatriation statute.

The statute involved here (Section 401 (j)) was added to the Nationality Act in 1944 because

draft evasion in World War II revealed the same need as had existed in earlier times of emergency. The provision applies only to those draft evaders who depart or remain out of the country to avoid service. Since readiness to serve in the forces—claims of conscience aside—has always been a cardinal element of our citizenship, such draft evasion is a repudiation of the most important demand of allegiance, and an expression of preference for whatever protection another country may give in place of fulfillment of a prime duty of American citizenship. One who intentionally chooses foreign residence in preference to the obligations of citizenship is not in a position to challenge the right of Congress to implement his choice by severing the cords of the allegiance he has rejected.

ARGUMENT

I

The District Court's holding that petitioner voluntarily remained out of the jurisdiction of the United States in order to evade military service was based upon ample substantive evidence and should be accepted

A. The district judge, as the trier of the facts, was confronted with two bodies of evidence. The first consisted of the written transcripts of petitioner's sworn testimony on three separate occasions before Boards of Inquiry of the Immigration and Naturalization Service, in 1947, 1950, and 1952, each of which included a clear admission by petitioner that he remained outside the

United States until the cessation of hostilities for the purpose of evading military service. *Supra,* pp. 5–7.

The second body of evidence consisted of petitioner's later testimony at the trial, in 1953, in which the general chronological and factual basis of petitioner's earlier admissions was corroborated, but in which the motive of draft-evasion was denied and the explanation proffered was simply that petitioner's mother would not allow him to leave Mexico and that he had not known, before 1946, of World War II or of his obligations as a United States citizen to register for military service. *Supra,* pp. 7–8.

The trial judge, having full opportunity to observe petitioner personally as he testified in court, disbelieved petitioner's new explanation of why he came to the United States only after the years of actual warfare had ended. The court found the facts to be as stated in petitioner's earlier testimony before the administrative tribunals, *i. e.,* that petitioner's mother's requests for him to remain in Mexico and his own motives for remaining had both been based upon the fact that hostilities were in progress before 1946, the year when he first returned.

The judge's appraisal of petitioner as an intelligent and bright young man (*supra,* p. 8) was a clear rejection of the efforts at the trial to portray his earlier testimony as a confused, inaccurate statement (*supra,* p. 7), and the

judge, just as clearly, found against the truth of the remainder of petitioner's later explanation, appraising it as mere self-serving testimony developed "after he consulted counsel and found out what his legal rights were" (*supra,* p. 8). Such evaluations are peculiarly within the province of the trial court, which hears and observes the witness. *McAllister* v. *United States,* 348 U. S. 19; *Knauer* v. *United States,* 328 U. S. 654, 660. Petitioner attempts (Pet. Br. 28–30) to establish some sort of rule-of-law for Mexican-American citizenship cases which would *require* the trier of facts to disregard prior statements made before administrative agencies, but it is obvious that there cannot be such a rule.[8] A reading of the three District Court cases petitioner cites shows that each was decided by the trial judge on its own facts and his own appraisal of the particu-

[8] Apparently to suggest that the Immigration Service interpreters are not satisfactory, petitioner remarks (Pet. Br. 4, 28, fn. 21) that the first interpreter at the trial, "a representative of the Immigration Service," was incompetent. But he fails to point out the significant facts that (a) petitioner's trial counsel provided no interpreter, and apparently assured Government counsel that petitioner would be able to understand and answer in English (R. 9); (b) when the court insisted on an interpreter, petitioner's counsel requested the "representative of the Immigration Service," who happened to be in court, to act as interpreter, although Government counsel expressed doubt as to this representative's ability to speak the language (R. 9); (c) it is quite obvious that this representative (Mr. Chandler) was not a regular interpreter used by the Immigration Service (see R. 11); and (d) it was Government counsel who insisted that a qualified interpreter be obtained (R. 11).

lar plaintiff before him.[6] In this very case, District Judge Harrison pointed out that in an earlier case he had held against expatriation of a Mexican-American because the "boy was away in the depths of Mexico and I admitted him because I felt he didn't appreciate or have an opportunity to recognize his obligations" (R. 33). But Judge Harrison found petitioner to be of an entirely different stripe (*supra*, pp. 8–9).

Petitioner also stresses (Pet. 26; Pet. Br. 26, 30) the special burden of proof in expatriation cases, but there is no basis for contending that that burden was misunderstood or misapplied in this instance. The trial judge clearly recognized that, upon the showing of United States citizenship by reason of petitioner's place of birth, the burden of showing loss of that citizenship was on the government (*supra*, pp. 8–9). But that burden could not have called for a greater degree of proof than that

[6] In *Ponce* v. *McGrath*, 91 F. Supp. 23, 25 (S. D. Cal.), Judge Metzger specifically found, from his observation of the plaintiff, that there was a "lack of understanding." "I formed the belief from watching him closely that he was trying his best to answer honestly, although at times he was considerably confused and faltered in uncertainty, and his attitude showed no marks of dishonesty but of extreme ignorance and considerable embarassment arising from it." In *Nieto* v. *McGrath*, 108 F. Supp. 150, 154–5 (S. D. Tex.), Judge Allred indicated that he did not find the plaintiff very intelligent, that it was doubtful that he even knew he was an American citizen; and the opinion speaks of "a Mexican peon." *Martinez* v. *McGrath*, 108 F. Supp. 155, 156 (S. D. Tex.) (Allred J.) follows the *Nieto* case, and refers to the plaintiff as "of the same illiterate type as Nieto."

actually adduced. Only petitioner's inner motives were in issue, and such elements of inner mental fact can be proved, of course, only by outer manifestations. Indeed, it is rarely possible to obtain as clear a body of evidence as that presented here. The time chosen by petitioner to return—the Japanese warfare ended September 2, 1945, and petitioner appeared at the gates of the United States on April 23, 1946—afforded eloquent background and support for petitioner's own admissions and both these factors were further illuminated by petitioner's conduct on the stand, as observed and noted by the judge.

Thus, the outward facts were undisputed and the subjective intent was as clearly disclosed as such intent is capable of being proved. The government did not—and ordinarily could not—produce friends of petitioner to attest to public admissions by him of his true motivation for remaining in Mexico—admissions prior to his statements before the immigration boards. But just as in selective service cases turning on the sincerity of claims to conscientious objection, it would be "pure naivety" to expect general or public admission of improper inner motivation. *Witmer* v. *United States,* 348 U. S. 375, 383. The evidence is uncontroverted that petitioner's mother informed him at an early age of his birth in the United States and that he desired, thereafter, to return to the United States (*supra,* p. 4); that he knew enough about the United States

even then to know its facilities for affording him better technical education (*supra,* p. 4); that he became 18 years of age in 1942 but returned to the United States only in 1946, after the war was over. The court was not required to brush aside all this, as well as petitioner's three-times enunciated admissions before the immigration authorities, in order to accept the astounding and implausible assertion that, although workers coming across the border concededly brought news of the war in 1946, petitioner had not known, in 1942 or at any time before the same year of 1946, of so momentous and catastrophic a fact as that the United States was engaged in World War II (*supra,* p. 8).

Knauer v. *United States,* 328 U. S. 654, is a denaturalization case in this Court applying the strictest standard of proof. The holding there was that the course of conduct disclosed that Knauer's state of mind when he foreswore allegiance to Hitler and Germany was actually fraudulent—that he was still loyal to them (328 U. S. at 669). The Court relied, as did the District Court in the instant case, upon objective facts—the character of the evidence, the veracity of witnesses as determined by the District Court, the corroboration of challenged evidence, and "the consistent pattern" of conduct (328 U. S. at 660), even though it was conceded by the Court that "[i]f isolated parts of the evidence against Knauer were separately considered, they might

well carry different inferences" (328 U. S. at 667). In *Knauer*, as here, it was observed that the claimant of citizenship was an astute person (328 U. S. at 669), making more necessary the ascertainment of the truth from the course of conduct as well as a careful evaluation of the particular individual.[7]

B. Petitioner cannot fairly claim that his mother's influence, after he had grown up, amounted to duress excusing his remaining abroad. During the war, many parents feared their sons' entry into the armed forces and some even tried to prevent enlistment or acquiescence in the draft. But persuasion or influence of this type cannot be used, except possibly in the most extraordinary cases, as the excuse for characterizing as "involuntary" the son's refusal to perform his duty. Once the young man attains the age which subjects him to service, he has full capacity in the eyes of the law for that particular purpose. As this Court observed in *Savorgnan* v. *United States*, 338 U. S. 491, 502, distinguishing cases of "real duress":—"'* * * the forsaking of American citizenship, even in a difficult situa-

[7] For lower court cases upholding expatriation on disputed evidence, see *e. g.*, *Acheson* v. *Mariko Kuniyuki*, 189 F. 2d 741 (C. A. 9), certiorari denied, 342 U. S. 942; *Coumas* v. *Brownell*, 222 F. 2d 331 (C. A. 9); *Scavone* v. *Acheson*, 103 F. Supp. 59 (S. D. N. Y.); *Kazdy-Reich* v. *Marshall*, 88 F. Supp. 787 (D. D. C.); *Cantoni* v. *Acheson*, 88 F. Supp. 576 (N. D. Cal.); *Bruni* v. *Dulles*, 121 F. Supp. 601 (D. D. C.).

tion, as a matter of expediency, with attempted excuse of such conduct later when crass material considerations suggest that course, is not duress.' *Doreau* v. *Marshall*, 170 F. 2d 721, 724 (C. A. 3) * * *."[8]

C. In his petition (Pet. 6–7), but not in his brief on the merits, petitioner summarily contends that his testimony in the administrative proceedings, concededly admissible in the District Court trial, is valid only for purposes of impeachment and cannot constitute substantive evidence warranting the trial court's findings. The point confuses a party's prior admissions with statements made outside of court by a witness not appearing in court; the common objections to the latter type of statement are not applicable to a party's sworn admissions. First, the absence of opportunity for cross-examination when the statements were made is of no significance when the statements are those of the party himself; he would not need to cross-examine himself. Secondly, the statements here were made under oath (although even that would not be necessary in the case of the same party

[8] In recent years, there have been many cases of "real duress" decided by the lower courts. *E. g.*, *Dos Reis* v. *Nicolls*, 161 F. 2d 860 (C. A. 1), cited at Pet. Br. 8, 2[illegible] (choice of conscription into the Portuguese Army or detention in a concentration camp); *Acheson* v. *Murakami*, 176 F. 2d 953 (C. A. 9) (renunciation of citizenship by Japanese-Americans at certain war relocation centers); *Acheson* v. *Maenza*, 202 F. 2d 453 (C. A. D. C.) (compulsion to service in army of Fascist Italy); *Augello* v. *Dulles*, 220 F. 2d 344 (C. A. 2) (same).

later testifying under oath at the trial). As stated by Wigmore (Evidence (3d ed.) § 1048):

> * * * The probative value, therefore, of the use of admissions is two-fold:
>
> In the first place, all admissions may furnish, as against the opponent [party], the same discrediting inference as that which may be made against a witness in consequence of a prior self-contradiction * * *. In the next place, all admissions, used against the opponent, satisfy the Hearsay rule, and, when once in, have such testimonial value as belongs to any testimonial assertion under the circumstances; and the more notably they run counter to the natural bias or interest of the party when made, the more credible they become; this element adding to their probative value, but not being essential to their admissibility.
>
> This double evidential utility explains the proposition, sometimes judicially sanctioned, that an admission is equivalent to affirmative testimony * * *.

In the careful analysis of the American Law Institute, *Model Code of Evidence* (1942), it is likewise stated that the common law rule permits evidence of a hearsay statement against a declarant who is a party to the action, and that (p. 245):

> While a few *dicta* may be found to the effect that an admission is receivable only as impeaching evidence, *the decisions* are *almost unanimous* that it is admissible also

as *tending to prove* the truth of the matter stated in it. [Emphasis added.]

The issue was clearly posed and squarely decided in an earlier immigration case, *Schoeps* v. *Carmichael,* 177 F. 2d 391 (C. A. 9), certiorari denied, 339 U. S. 914. There, as here, prior statements before the immigration authorities were later denied. The statements were accepted by the court as "substantive evidence" (177 F. 2d at 397–398). See also: *Wong Ken Foon* v. *Brownell,* 218 F. 2d 444, 446 (C. A. 9) (prior admissions in citizenship case); *Miles* v. *United States,* 103 U. S. 304, 308–309, 311, admissions of defendant "to prove the fact" of his first marriage; *State Farm Mut. Auto. Ins. Co.* v. *Porter,* 186 F. 2d 834, 842–843 (C. A. 9), admissions that car involved in accident was driven with owner's permission; *Warde* v. *United States,* 158 F. 2d 651 (C. A. D. C.), testimony at previous trial admissible against defendant in prosecution for gaming as it had "tendency to establish his guilt" (p. 651); *Hardy* v. *Commissioner of Internal Revenue,* 125 F. 2d 863, 865 (C. A. 9), statements of taxpayer in a prior separate maintenance proceeding constituted substantive evidence before Board of Tax Appeals that a certain agreement was not abrogated; *Milton* v. *United States,* 110 F. 2d 556, 560 (C. A. D. C.), transcript of defendant's testimony in earlier housebreaking trial held admissible in forgery trial and of "probative value"; *Harrison* v. *United States,* 42 F. 2d 736, 737 (C. A. 10), answer to question as to

service-incurred disability held "substantive evidence" in later suit of declarant claiming disability.[9]

II

On the findings of the courts below, petitioner was expatriated under Section 401 (j) of the Nationality Act of 1940 (as amended)

A. *The Act applies to draft-evaders remaining abroad as well as those who left the country.* Petitioner presents a new argument, not developed below or presented in his petition for certiorari, to the effect that the Section 401 (j) does not relate to a person who stayed away from the United States to evade the draft, as distinguished from one who was present in the United States and left for the purpose of evasion (Pet. Br. 20–25).

The argument is clearly and fully foreclosed by the statutory language, which specifically desig-

[9] Petitioner does not suggest that his earlier testimony would require corroboration, for the rule in criminal cases is not applicable to this civil proceeding. 7 Wigmore, *Evidence* (3d ed.) § 2075, p. 406; 4 *Id.* § 1055. Moreover, if the requirement of corroboration were held to apply, ample corroboration would be established by the testimony at the trial, within the standards recently clarified by this Court in *Opper* v. *United States*, 348 U. S. 84, 93. Petitioner's testimony under oath at the trial clearly corroborated the earlier admissions as to the fact of his basic desire to return to the United States (*supra*, pp. 4, 8), the fact that workers from the United States brought news of the United States to petitioner's farm at least at the later time admitted by petitioner at the trial (*supra*, p. 8), the fact that influential conversations with his mother actually occurred (*supra*, pp. 7–8), and the date of his return in 1946 after hostilities had ended.

nates persons "departing from *or remaining* outside of the jurisdiction" (*supra*, p. 3; emphasis added). Petitioner attempts to support his contention by some more or less informal utterances in debate at the time of the enactment of the provision. These remarks stressed, as was natural, the more superficially striking examples in which draft-evaders actually fled the United States (Pet. Br. 20–22). However, the language of the statute, employing the disjunctive "or," is clearly broader and furnishes the complete answer to the argument. Nor does petitioner present a single instance in which the legislators sought to restrict the proposal to the particular examples of which they were speaking, or to deny its application to anyone who remained beyond the United States in order to evade service.

There is no basis in reason for the suggested distinction between persons who are alike in having a purpose to evade their duty to their country and who are equally successful in doing so. There is no significant difference between the American who departs to avoid service and he who, happening to live abroad, deliberately remains there for the same purpose. While petitioner's is not the picturesque case of one fleeing the United States,[10] it is the case of one who was

[10] For the Court's information, we may point out that, by stipulation of counsel at the trial, the case of the *amicus curiae*, Francisco Mendoza-Martinez, does squarely present the case of a native-born American who registered for the draft in the United States (in 1940) and then departed for

aware of his United States nationality and made a clear and affirmative change his action in order to evade the draft. He intended to return to the United States (*supra*, pp. 4–7) but refrained from doing so until after the war (*supra*, pp. 4–7, 8). He thereby deprived the United States of his services as effectively and as willfully as an evader who, by reason of the accident of location, commenced his draft-dodging in the United States and then fled the country. In each instance, the significant element is not that the offender was recently in the United States but that he spurned his duty to protect his country, chose the safety of another land, remained away from the reach of criminal punishment, and created international problems as a draft-evading citizen residing in a foreign country.

B. *The Executive Agreement of January 22, 1943, did not remove petitioner from the coverage of the Act.* Another belated contention (not raised below or presented in the petition) is that the Executive Agreement of January 22, 1943 (E. A. S. 323, 57 Stat. 973), between the United States and Mexico, relating to nationals of either nation in the armed forces of the other, somehow indicates that one who registered for military service in Mexico cannot be considered an evader of United States military service within the pro-

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Mexico (in 1942) in order to avoid service in the armed forces. The *Mendoza-Martinez* case is now on appeal to the Court of Appeals for the Ninth Circuit.

visions of Section 401 (j). Petitioner testified briefly that he registered for military service in Mexico in 1942 (R. 16), but the circumstances were not developed since this point was not raised below.

1. The short answer is that the Agreement is irrelevant to the question of the duty *to the United States* of an American citizen resident in Mexico. It is an agreement establishing the relationships *of the two countries* with respect to military service by the nationals of the one in the armed forces of the other, and it has nothing whatsoever to do with the duties of the nationals themselves to their respective countries.[11] Thus,

[11] The text of the operative paragraphs of the Agreement is as follows (57 Stat. 973, 975–976):

"I. The nationals of either country resident within the territory of the other may be registered and inducted into the armed forces of the country of their residence on the same conditions as the nationals thereof unless otherwise provided herein.

"II. Nationals of either country residing in the other shall be accorded the same rights and privileges as nationals of the country of residence. In the selection and induction into their armed forces of nationals of the other country the authorities of the respective countries shall take into account on the same basis as if their own nationals were involved the physical condition and health of the individuals concerned, their civil status, their financial dependents, regardless of the place of residence and any other circumstances which under the laws and regulations in force in the country of residence would apply in selecting and inducting nationals of the latter country.

"III. Nationals of either country in the territory of the other country for purposes of study and with the intention of returning to the country of which they are nationals upon

the first paragraph permits the induction of residents, the second and seventh paragraphs provide that such inductees have rights comparable to nationals of the country, the third and fifth paragraphs exempt temporarily-resident students and government officials from induction, the fourth paragraph provides that "border crossers" shall be considered residents where they "actually live", the sixth provides for interchange of information between the two governments, and the eighth paragraph permits the governments to assist in the welfare of their respective nationals.

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the termination of such study shall upon establishing such facts in accordance with existing selective service laws and regulations be relieved from the obligation of military service.

"IV. Nationals of either country who under the immigration laws of the other country are technical residents of that country known as 'border crossers' shall for military service purposes be considered residents of the country in which they actually live.

"V. Officials and employees of either country residing in the other whose official status has been notified to the Government of the country in which they are residing and accepted by that Government shall not be considered for military service purposes as residents of the country in which they are residing.

"VI. Each Government in so far as necessities imposed by the war effort permit will furnish the other Government with information concerning its nationals who have registered for or been inducted into the military service.

"VII. Nationals of either country serving in the armed forces of the other country shall receive the same treatment and have equal opportunities with respect to commissions, promotions and other incidents of military service as are

In the context of this Agreement as a whole, the ninth paragraph, so extensively relied upon by petitioner (Pet. Br. 23–25), appears in its proper significance as a mere optional means of releasing inductees of one country upon request of the other country. The provision, in full, is as follows:

> IX. Nationals of each country who have been registered for or inducted into the Army of the other country in accordance with the military service laws of the latter and who have not declared their intention to acquire the citizenship of the country

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accorded by that country in conformity with military law and practice to its nationals.

"VIII. Representatives of either Government shall have the right to assist their nationals serving in the military forces of the other in all matters relating to their welfare including but not limited to the payment of pensions, gratuities, indemnities or other benefits to them or their dependents wherever the latter may be resident.

"IX. Nationals of each country who have been registered for or inducted into the Army of the other country in accordance with the military service laws of the latter and who have not declared their intention to acquire the citizenship of the country in which they reside shall upon being designated by the country of which they are nationals and with their consent be released for military service in its forces provided that this has no prejudicial effect on the common war effort. The procedure for the transportation and turning over of these persons will be agreed upon by the appropriate authorities of the two countries who are empowered to bring about the objectives desired.

"X. The understandings in the foregoing arrangement shall be in effect as of today for the duration of the present war and six months thereafter."

> in which they reside shall upon being designated by the country of which they are nationals and with their consent be released for military service in its forces provided that this has no prejudicial effect on the common war effort. The procedure for the transportation and turning over of these persons will be agreed upon by the appropriate authorities of the two countries who are empowered to bring about the objectives desired.

In no sense do the terms of this paragraph absolve any national from his duty to his country—his duty, at the very least, to register when called upon to do so, and to return, if so ordered. The arrangement is solely between the United States and Mexico, and individuals are granted no exception from the selective service laws.

Moreover, the paragraph and the whole Agreement are to be read in their setting. In January 1943, when the Agreement was executed, the United States was not yet designating its nationals for return to our military forces, although paragraph IX clearly contemplated that prospect. Nor was the requirement of registration for selective service generally applicable to residents abroad. The basic selective service legislation left these steps to presidential proclamation. Within the year of the Executive Agreement, however, on October 26, 1943, a presidential proclamation provided (Proclamation 2597, 8 F. R. 14595) for registration of non-resident nationals from

ages 18 through 45 before specified officers, including diplomatic or consular officers. Petitioner's statement that the proclamation made "no requirement for returning to the United States" (Pet. Br. 23) embodies the erroneous implication that the registration requirement was a meaningless gesture. The contrary was true. The selective service board established under the proclamation proceeded into active functioning, and many non-residents were called into service, as petitioner might have been called had he registered as required. The proclamation made no exception with respect to persons registered with a foreign military force, nor did it require their consent; also, no such exemptions appear in the regulations implementing the proclamation (see Selective Service System, *Local Board Memorandum No. 189,* issued Feb. 9, 1944).

Even assuming *arguendo* that the Executive Agreement's ninth paragraph, *supra,* pp. 31–32, may possibly have given an indirect means of escape from United States military service to a United States national by permitting him to withhold consent to his release from Mexican service, the duty to register under the United States selective service law existed regardless of consent, after the issuance of the Proclamation of October 26, 1943. Under no theory was petitioner excused from his minimum duty in that respect. Whatever may have been the effect of Mexican registration if petitioner acted in accordance with his

known duty under American law to register for selective service, the fact is that, in order to evade the draft, he did not make himself known to the United States selective service authorities. No possible reading of the Executive Agreement can make that action lawful. Nor can the failure to register be deemed immaterial. If an American national evaded his duty to register, the United States Government would not be in a position to exercise its rights under the Executive Agreement even to attempt to have the national withdrawn from Mexican service.

2. Significantly, upon the enactment in 1944 of Section 401 (j), expatriating draft-evaders remaining outside the United States, no exception was made expressly or impliedly indicating that any American national was to be excused from the effect of draft evasion because of registration for foreign service (even a registration permitted or countenanced by our laws). Moreover, Congress spoke of a purpose of "evading" *or* "avoiding" American military service, thus emphasizing its design to expatriate all those whose goal was not to serve this country.

In contrast, another provision of the same expatriation section of the Nationality Act expressly provided an exception—comparable to the one petitioner urges be read into Section 401 (j)—for foreign service authorized by our laws. Subsection (c) of Section 401 provided for expatriation for a dual national (*infra*, p. 65):

> Entering, or serving in, the armed forces of a foreign state *unless expressly authorized by the laws of the United States* * * *. [Emphasis added.] [12]

The Congress thereby provided for an exception *in advance* of such agreements as the one here adduced. It is the more clear that there was no intent to make a similar exception under subsection (j), when it is recognized, not only that subsection (j) contains no such specific language of exception, but also that it was not enacted until 1944 *after* the execution of the Executive Agreement in question.

Of course, if there were a conflict between the Executive Agreement and Section 401 (j), the latter would control. *Moser* v. *United States,* 341 U. S. 41, 45; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 720. But it is unnecessary to posit a clash. Statute and agreement can be read harmoniously. As shown above, the Agreement does not affect the individual obligations and duties toward this country of American citizens in Mex-

[12] In the discussion concerning this provision, by the Secretary of State, the Attorney General, and the Secretary of Labor, it was pointed out that "[t]he words 'unless expressly authorized by the laws of the United States would relate not only to statutes * * * but also to conventions such as those concluded during the World War * * * under which either party was allowed to draft, under certain conditions, persons having the nationality of the other * * *". Hearings before the House Committee on Immigration and Naturalization, 76th Cong., 1st Sess., on H. R. 6127 superseded by H. R. 9980, p. 490. And see Roche, *Loss of American Nationality*, 99 U. of Pa. L. Rev. 25, 50.

ico (*supra*, pp. 29–34); conversely, the Act covers all those who remain abroad for the specific purpose of *avoiding* American military service (as well as those who actually *evade* their legal obligations). Petitioner's continued absence from this country, during World War II, was never ascribed to military service in Mexico or to his desire to fulfill that obligation, but to the aversion that he and his mother both felt to military service in war time when he might be injured or killed. He did not fail to register with the American authorities because he believed that he was not required to register or that his Mexican registration was sufficient. Admittedly, he knew of his duty to register under our laws; he did not do so because he did not want to come to the United States and to serve in our forces. *Supra*, pp. 4–7, 8. In short, under his own testimony and the facts found by the trial judge, petitioner falls squarely within Section 401 (j) and the Executive Agreement furnishes him with no excuse.

C. *Section 401 (j) covers draft-evaders under 21 years of age.*

Petitioner suggests (Pet. Br. 30–31) that Section 401 (j) could not apply before July 21, 1945, when he became 21.[13] On the contrary, we believe that Section 401 (j) governs all persons, including those under 21, who were subject to selective service requirements. During World War II,

[13] This is another issue which was not raised below or presented in the petition for certiorari.

these requirements applied to men over 18 (Proclamation 2597, 8 F. R. 14595) and, as pointed out above, they were extended to Americans resident abroad on October 26, 1943 (*supra*, pp. 32–33).

The problem arises because of the structure of the expatriation provisions of the 1940 Act. Section 401 of the Nationality Act of 1940, 8 U. S. C. 801, provided for 10 methods of expatriation, lettered (a) to (j) respectively.[14] Section 403 (b) (8 U. S. C. 803 (b)) then provided (*infra*, p. 66):

> No national under eighteen years of age can expatriate himself under subsections (b) to (g), inclusive, of section 401.

Since subsection (j) is not enumerated in Section 403 (b), there is no numerical textual determination of the age at which that subsection governs. Section 403 (b) is phrased in the negative, not as lowering an extraneous age limit which would otherwise control, but as itself establishing a minimum age to rule the cases to which it applies. Nevertheless, it has been suggested that, outside of the purview of Section 403 (b), the civil age of consent—21 years—is the applicable age. Cf. *McGrath* v. *Abo*, 186 F. 2d 766 (C. A. 9), certiorari denied, 342 U. S. 832.

In our view, however, the proper answer is supplied by the historical development of Ameri-

[14] Subsections (a)–(h) were contained in the Nationality Act of 1940, as originally enacted. Subsection (g) was amended by the Act of January 20, 1944, 58 Stat. 4. Subsections (i) and (j) were added by the Acts of July 1, and September 27, 1944, 58 Stat. 677 and 746, respectively. See *infra*, pp. 64–66.

can nationality legislation which, based as it is on the doctrines of fealty and allegiance, has now created its own standards of capacity independent of the principles generally governing the civil disabilities of minors. Cf. III Hackworth, *Digest of International Law*, 271.[15] Prior to the enactment of the Nationality Act of 1940, the courts were in conflict whether the 21 year age limit applied to political capacity with respect to expatriation. *Baglivo* v. *Day*, 28 F. 2d 44 (S. D. N. Y.), held that it did, but *In re Wittus*, 47 F. 2d 652 (E. D. Mich.), came to the opposite result. In *Perkins* v. *Elg*, 307 U. S. 325, this Court was confronted with the question whether a child born here of naturalized American citizens lost her American citizenship upon removal during her minority to Sweden where her parents resumed their original citizenship. In the discussion of this problem, Chief Justice Hughes stated at p. 334:

> To cause a loss of citizenship * * * there must be voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his

[15] The fact that a person under the age of 21 lacks full *contractual* capacity does not mean that the law considers him incompetent for all purposes until he reaches that age. The law permits a minor to make many binding decisions, some of which have far more serious consequences than simple contracts. Cf. 5 Vernier, *American Family Laws*, § 282 And minors can, of course, be guilty of criminal offenses.

> control and who during minority is incapable of a binding choice.[16]

In the *Abo* case, the court failed to recognize the limited scope of this statement, and read it as holding generally that a minor could not renounce citizenship in the absence of an express statutory authorization. But Chief Justice Hughes was speaking of an infant for whom an election of nationality had been made by someone else, not of a person over eighteen years considered by the law as capable of doing many things and who had taken significant action himself. The Court was also speaking at a time when the nationality laws did not indicate that Congress viewed minors as capable of expatriation.

In the Nationality Act of 1940, enacted some 18 months after the decision in the *Elg* case, Congress established 18 as the general age of discretion in nationality matters. The cabinet committee report[17] which first set forth the 18-year

[16] Miss Elg was four years of age when her parents took her to Sweden (307 U. S., at 327).

[17] The groundwork for this legislation was laid by an interagency committee appointed by the President by Executive Order No. 6115 of April 25, 1933 (Hearings before the Committee on Immigration and Naturalization, House of Representatives, 76th Congress, First Session, on H. R. 6127 superseded by H. R. 9980 (hereinafter referred to as "Hearings"), p. 407). The Committee, composed of the Secretaries of State and Labor and the Attorney General, submitted a proposed codification of the nationality laws of the United States which was transmitted by the President to Congress on June 13, 1938 (Hearings, p. 406). This proposed code, amended after extended hearings, became the Nationality Act of 1940.

limit on expatriation [18] contained the following explanatory comment: [19]

> The reasons for adopting this provision are obvious. It does not seem reasonable that an immature person should expatriate himself by any act of his own. [Citing authorities.] It will be observed that in this subsection the age below which a person cannot expatriate himself is set at 18 years instead of 21 years. *It is believed that a person who has reached the age of 18 should be able to appreciate fully the seriousness of any act of expatriation on his part.* * * * [Emphasis added.]

Congress retained this 18-year limit in spite of repeated attempts to raise it to 21.[20] Morover, Sections 314, 315, 316, and 331 of the Nationality Act of 1940 show that Congress generally considered the age of 18 as the age at which a person is sufficiently mature to make a binding decision concerning his nationality. The 21-year standard plays no part in the statutory scheme.

Thus, the failure of Section 403 (b) to refer to subsections 401 (a), (h), (i), and (j) does not mean that these methods of expatriation presuppose majority. A reference to Section 401 (a) (*infra*, pp. 64–65) was probably omitted because that provision contains its own age limit in the case of a person naturalized abroad by the naturalization

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[18] Hearings, p. 492.

[19] Hearings, pp. 492–493.

[20] Hearings, pp. 289, 388, 398.

of a parent, as well as in order to avoid the creation of dual nationality in the event that another country should permit a person to become naturalized on his own petition at a younger age than 18. Subsections (h) and (j) (*infra*, p. 66) presuppose capacity to commit treason and liability to the draft, respectively, and Congress must have intended to incorporate, by reference, the age requirements applicable to commission of the crime of treason, and to selection for the draft.[21]

In *McGrath* v. *Abo, supra,* the Ninth Circuit held the minimum age for renunciation of citizenship under Section 401 (i) (*infra*, p. 66) was 21 years. We challenged that ruling at the time (by a conditional cross-petition for certiorari) and there is much to be said against it even as applied to renunciations under Section 401 (i). But the provision now before the Court—Section 401 (j)—is quite different, and the *Abo* ruling, even if it be accepted, is not decisive. As we have suggested, Section 401 (j) plainly incorporates the age requirement applicable to selective service. Whenever a young man attained the age which made him subject to "training and service" in the armed forces—in a particular war or during a particular period of national emergency—he also

[21] The failure to include 401 (i) (*infra*, p. 66)—enacted in order to permit renunciation of citizenship by Japanese-Americans interned in relocation centers—in 403 (b) was probably a mere oversight. When subsection (i) was added to Section 401, Congress apparently forgot to amend Section 403 (b) accordingly.

became automatically subject to the provisions of Section 401 (j).

III

Congress has the constitutional power to provide for the loss of United States nationality by citizens who, in time of war, voluntarily remain outside the jurisdiction of the United States to evade or avoid military service

Petitioner's contention that the power of Congress to expatriate is restricted to mere recognition of a citizen's own choice of a new allegiance (Pet. 29–34; Pet. Br. 6–18) disregards the whole course of responsible judicial decision on the subject of loss of nationality. This Court has consistently held that the power to fix the conditions for loss of nationality is an attribute of sovereignty which may be reasonably exercised on the basis of national need. While the particular act upon which expatriation rests must be a voluntary one, the courts have held that the person voluntarily committing the expatriating act need not, at the time, have the subjective intent to expatriate himself, *i. e.*, to choose another allegiance over that of this country. If he freely does the act which Congress has specified as a basis for loss of nationality, and if that act has reasonably been found by Congress to be a basis for expatriation, then the doing of the act results in loss of his American nationality, whatever the internal feeling of the doer as to his allegiance.

These settled principles establish the constitutionality of Section 401 (j).[22] There is a national need for dealing with draft evaders who remain outside the jurisdiction of the United States and thus outside the reach of ordinary criminal sanctions. As early as 1865, Congress provided for forfeiture of the rights of citizenship upon failure of deserters to return to the armed forces, or upon departure of enrolled draftees from their district or from the United States with intent to avoid draft into the armed forces. Act of March 3, 1865, Sec. 21, 13 Stat. 490. This statute remained in effect until repealed by the Nationality Act of 1940, and was soon reinstated, in effect, by the provision here involved, which was passed in 1944. See *infra*, pp. 58–61. Such evaders pose a problem in the nation's international relations by retaining rights to treatment as United States citizens in foreign countries at a time when they are unwilling to fulfill the obligations of citizenship. Thus, the prescribing of loss of nationality under the conditions specified in Section 401 (j) is a matter of "national moment" within the constitutional powers of Congress (see *Mackenzie* v. *Hare*, 239 U. S. 299, 312).

[22] We note that *amicus curiae* Francisco Mendoza-Martinez, whose expatriation case is now pending in the Court of Appeals for the Ninth Circuit, has raised in his case only the issue of the validity of Section 401 (j). He stipulated in the District Court "all operative facts necessary to the application of 401 (j)" of the Nationality Act of 1940. See his *Amicus Curiae* Brief, p. 2, and footnote 10, *supra*, p. 27.

A. *The power to expatriate is an implied attribute of sovereignty and is not restricted to instances where the citizen desires to give up his American nationality.*

The main burden of the arguments of both petitioner and of *amicus curiae* Mendoza-Martinez is that Congress cannot impose expatriation upon an American who does not desire to give up his citizenship or does not consent to his loss of nationality. This erroneous conclusion is thought to follow from the citizenship provision of Section 1 of the Fourteenth Amendment, as well as from the absence from the list of Congressional powers, in Article I, Section 8, of any reference to expatriation.

1. The argument that the Congressional power to expatriate is necessarily hobbled because it is not expressly spelled out in the Constitution was long ago answered by this Court in *Mackenzie* v. *Hare,* 239 U. S. 299, upholding the validity of the statutory expatriation (34 Stat. 1228, c. 2534) of a native-born woman upon her marrying an alien, even though she had no specific intent to expatriate herself and never left the United States. The Court said (239 U. S. at 311):

> But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and

> intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.

This doctrine of implied powers in the field of foreign relations is, of course, one of long standing and great breadth. See *e. g. United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 318. As applied to the power of the United States, as a nation, to fix the conditions which will result in loss of nationality, it has not seriously been questioned since *Mackenzie.* It was assumed in *Savorgnan* v. *United States,* 338 U. S. 491, in which the Court upheld the statutory expatriation of a native-born citizen as against her contention that she did not intend to renounce her citizenship by obtaining Italian citizenship while in the United States and then residing abroad. In *Perkins* v. *Elg,* 307 U. S. 325, the Court, in sustaining a claim of retention of citizenship, recognized the power to expatriate, stating (307 U. S. at 329):

> [C]itizenship [at birth] must be deemed to continue unless she has been deprived of it through the operation of a treaty *or congressional enactment* or by her voluntary action in conformity with applicable legal principles. [Emphasis added.]

See, also, *Kawakita* v. *United States,* 343 U. S. 717, 722–731; *Mandoli* v. *Acheson,* 344 U. S. 133.

The lower courts have taken the same view of the inherent power to expatriate. *Lapides* v. *Clark,* 176

Americans, freed from all legal ties, duties, or allegiance to the states of their original citizenship. See *Savorgnan* v. *United States*, 338 U. S. 491, 497–499; *Mandoli* v. *Acheson*, 344 U. S. 133, 135–6.[24]

But Congress has also been increasingly concerned with the other side of the coin—with removing from the body of our citizenship those Americans who, by their voluntary acts, have shown that they should no longer be citizens of this country even if they desire to remain such. During the Civil War Congress forfeited the "rights of citizenship" of deserters and draft-evaders,[25] and in the Citizenship Act of 1907, 34 Stat. 1228, Congress enacted general legislation imposing expatriation on Americans who perform various types of acts. From 1940 to 1952, the expatriation provisions were set forth in Section 401 of the Nationality Act of 1940 (*infra*, pp. 64–66); since December 1952,

[24] The development of the general American doctrine of expatriation, with its vicissitudes before the 1850's, is described in III Moore, *Digest of International Law*, Secs. 431–469; III Hackworth, *Digest of International Law*, *Secs.* 242–250; II Hyde, *International Law Chiefly as Interpreted and Applied in the United States* (1945 ed.), Secs. 376–387A; Moore, *The Principles of American Diplomacy*, ch. VII, reported in IV *Collected Papers of John Bassett Moore*, pp. 388–406; Flournoy, *Naturalization and Expatriation* (1922), 31 Yale L. J. 702, 848; Tsiang, *The Question of Expatriation in America prior to 1907* (1942), Johns Hopkins University Studies in Historical and Political Science, Series LX, No. 3; Brief for the Petitioners, pp. 20–27, in *Perkins* v. *Elg*, Oct. Term, 1938, No. 454.

[25] This statute is discussed in detail, *infra*, pp. 58–60.

the controlling provisions have been those of Sections 349–357 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. 1481–1489.[26]

In applying and sustaining these provisions for compulsory expatriation, the courts have established that the power of Congress is not restricted merely to recognizing the intent of the citizen to renounce his American nationality. Most of the acts specified by Congress for expatriation are objective, and it is immaterial that the person may desire and intend to retain his citizenship in this country. As noted above (*supra,* p. 44), in the foundation case of *Mackenzie* v. *Hare,* 239 U. S. 299, the Court held that a woman lost United States nationality by marriage to a foreigner even though she did not intend to renounce her citizenship. The loss of citizenship was the result of her voluntary act in marrying the alien. As the Court said, 239 U. S. at 312, her act was "as voluntary and distinctive as expatriation and its consequence must be considered as elected."

In *Savorgnan* v. *United States,* 338 U. S. 491, the Court expressly ruled that the subjective intent of the citizen not to lose United States nationality could not overcome the effect of her

[26] The Act of July 27, 1868, 15 Stat. 223, Rev. Stat. § 1999, 8 U. S. C. 800, gave legislative recognition to the "right of expatriation" as a "natural and inherent right of all people," but did not define what constituted expatriation. Until the 1907 Act was adopted, there was no general Congressional measure prescribing specific modes in which expatriation could be effected—aside from the deserter and draft-evader statute.

voluntary action in acquiring Italian nationality. It characterized the expatriating act as objective (338 U. S. at 497, 499) and declared, at p. 500:

> There is nothing, however, in the Act of 1907 that implies a congressional intent that, after an American citizen has performed an overt act which spells expatriation under the wording of the statute, he, nevertheless, can preserve for himself a duality of citizenship by showing his intent or understanding to have been contrary to the usual legal consequences of such an act.

And in a footnote the Court further observed (338 U. S. at 501):

> In § 401 of the Act of 1940, Congress added a number of *per se* acts of expatriation. These included, among others, entering the armed forces of a foreign state, accepting office in a foreign state to which only nationals of such state were eligible, and voting in a political election of a foreign state. Lack of intent to abandon American citizenship certainly could not offset any of these. * * *

In *Kawakita* v. *United States,* 343 U. S. 717, 721–730, the Court and both parties assumed that Kawakita would have been expatriated if he had committed one of the statutory acts of expatriation, regardless of the jury's finding that he never intended to renounce American citizenship (see p. 732). Similarly, in *Mandoli* v. *Acheson,* 344 U. S. 133, it was immaterial whether Mandoli thought he was an American or an Italian.

In the earlier lower court case of *Ex parte iffin*, 237 Fed. 445, 453 (N. D. N. Y.), it was d: "If it be the natural and inherent right a citizen to expatriate himself or herself, it uld seem that the government should have the ht to declare that the doing of acts by the zen which are inconsistent with the discharge his duties as such citizen to his government, ompanied by a departure from its jurisdiction, stitute expatriation—abandonment and renun- tion of citizenship." See also *Revedin* v. *heson*, 194 F. 2d 482, 484 (C. A. 2), certiorari ied, 344 U. S. 820 ("She cannot escape [the visions'] effect merely because she did not in- d to be bound by them or because she kept rself insulated from the significance of free l conscious acts for which she must be held ponsible"); *Acheson* v. *Wohlmuth*, 196 F. 2d , 871 (C. A. D. C.), certiorari denied, 344 U. S. ("A person cannot avoid the consequences ich Congress has attached to his overt acts by iming ignorance of the law or a contrary in- tion on his own part * * *"). The other es cited *supra*, pp. 45–46, 22 (fn. 7), have also eld the loss of nationality by the doing of speci- acts, regardless of the subjective purpose or ent of the citizen."

The Government has heretofore urged that the acts of atriation listed in Section 401 of the Nationality Act of are the exclusive means of losing American nationality. Brief for the United States, *Kawakita* v. *United States*, 570, Oct. Term, 1951, at pp. 38–44, and Brief for the

Petitioner lays great stress (Pet. Br. 12–14) upon a series of rulings by Chief Judge McLaughlin in the District Court for the District of Hawaii, voiding provisions (subsections (c), (d), and (e)) of Section 401 of the Nationality Act of 1940, *infra*, p. 65) which expatriate Americans who serve in the army of another nation of which they are also nationals, accept office in such a nation, or vote in foreign political elections. The government appealed the first two of these decisions (*Kiyokuro Okimura* v. *Acheson*, 99 F. Supp. 587, and *Hisao Murata* v. *Acheson*, 99 F. Supp. 591), but this Court remanded (342 U. S. 899, 900) for findings as to the circumstances under which the claimed citizens had performed their services in the Japanese army or voted in Japanese elections. Upon remand, the judge, while finding no "legal duress", made clear findings of outright compulsion. 111 F. Supp. 303, 306. Since these findings of coercion were entirely comparable to findings made in a large number of other Japanese-American expatriation cases in Hawaii and the federal District Courts on the West Coast which the government had not appealed, the govern-

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Respondent, *Mandoli* v. *Acheson*, No. 15, Oct. Term, 1952, at pp. 68–80, 86–88. The Court has found it unnecessary to pass upon this contention. See *Kawakita* v. *United States*, 343 U. S. 717, 730–732; *Mandoli* v. *Acheson*, 344 U. S. 133, 139. In reserving the question the Court, we assume, contemplated that there might be other means of exercising the *right* of expatriation by an individual who *did* desire to renounce his American allegiance.

ment sought no review of the ultimate holding in these two Hawaii cases that American citizenship had not been lost. Similarly, in the other cases in which Judge McLaughlin has invalidated provisions of Section 401, the government has not appealed to this Court because (a) in each instance the record or findings revealed duress or coercion or some other infirmity of the type which has led the other district judges trying this class of Japanese-American expatriation case to hold—without invalidating the statute—that expatriation did not occur;[28] and (b) the Ninth Circuit, which includes the District of Hawaii, has already sustained the validity of these provisions of the statute. See *Miranda* v. *Clark,* 180 F. 2d 257, 259 (C. A. 9); *Acheson* v. *Mariko Kuniyuki,* 189 F. 2d 741, 744 (C. A. 9), certiorari denied, 342 U. S. 942; opinion in the instant case, R. 36; *Vidales* v. *Brownell,* 217 F. 2d 136, 138 (C. A. 9).

3. Petitioner has misinterpreted decisions in which the courts have held that it was the intent of Congress that the expatriating act should be a voluntary one. *E. g., Perkins* v. *Elg,* 307 U. S. 325, 334; *Acheson* v. *Maenza,* 202 F. 2d 453, 457 (C. A. D. C.); *Dos Reis* v. *Nicolls,* 161 F. 2d 860 (C. A. 1); *supra,* pp. 22–23. An act may be done voluntarily, such as the marriage in *Macken-*

[28] The Government has generally not appealed these decisions when based on duress or a comparable nonconstitutional ground.

zie v. *Hare,* or the acquisition of Italian nationality in *Savorgnan,* or voting in a foreign election, without being accompanied by the subjective intent to renounce United States nationality. So here, if petitioner's staying out of the country to avoid military service were not his voluntary act, he would not be within Section 401 (j). See *supra,* pp. 22–23. But once he voluntarily stayed out of the country for the purpose of evading military service, it becomes immaterial whether or not he intended thereby to renounce his American citizenship or whether he even knew that his act would result in loss of American citizenship. As we have shown, it is the intentional doing of the act prescribed by Congress which results in the loss of nationality.

B. *There is a reasonable basis for prescribing loss of nationality for those who remain out of the country in order to evade military service.*

While the decisions discussed above make clear that Congress has the power to fix the conditions for loss of nationality regardless of the intent of the individual to renounce or give up his citizenship, it is plain that this power cannot be exercised arbitrarily or unreasonably. The important question in this case, therefore, is what are the considerations which must govern such action by Congress.

[78] The Government has generally not appealed these decisions when based on duress or a comparable non-constitutional ground.

1. It has been urged (see Pet. Br. 13) that, at most, Congress can condition the loss of nationality only upon acts which evince the actual acceptance of some other nationality, such as naturalization in a foreign state. But this is only one step removed from the argument that Congress can do no more than recognize the desire of a citizen to change nationality; it makes action by Congress dependent on an individual citizen's preference of nationality, although evidenced by acts rather than subjective declaration of intent. As stated above, we find in the decisions of the courts no such limitation on the authority of Congress to exercise the power inherent in sovereignty to determine what acts shall result in the loss of nationality. And while the actual statutes which have come before the courts have, for the most part, concerned situations involving some relationship to another country, it is significant that the courts, in upholding the statutes, have spoken, not in terms of the citizen's acceptance of some other nationality, but of the sovereign national need to determine questions which affect its international relations and its citizenship.

Here, too, the basic case is *Mackenzie* v. *Hare*, 239 U. S. 299, involving a woman's loss of nationality by marriage to a foreigner. (See *supra*, pp. 44–45, 49.) It is true that marriage had a past legal history—albeit a confused one—of relation-

ship to citizenship, but the Court sustained her expatriation, not so much because of that relationship as due to the national need to conduct international relations harmoniously. The Court said, at p. 316:

> [T]he legislation was urged by conditions of national moment. And this is an answer to the apprehension of counsel that our construction of the legislation will make every act, though lawful, as marriage, of course, is, a renunciation of citizenship. * * * This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies.

Thus, the Court considered the validity of expatriation dependent upon its relationship to "conditions of national moment," not upon its connection with the citizen's own choice of nationality.

Similarly, mere residence abroad for five years on the part of a naturalized citizen, particularly in a country not of his original allegiance, does not evidence an intent to adopt a nationality other than United States nationality. Yet the national interest opposed to prolonged stays abroad by citizens formerly bearing foreign allegiance was held to be a sufficient basis for sustaining the power of Congress to enact the provision. *Lapides* v.

Clark, 176 F. 2d 619, 620–621 (C. A. D. C.), certiorari denied, 338 U. S. 860 (*supra*, pp. 45–46).

Historically, then, the statutory acts of expatriation have included not only those which indicate choice of another allegiance over American, or an attachment to a foreign country which is necessarily inconsistent with American nationality. Lack of allegiance to or support of this country (whether or not preference for another nation is exhibited) is a significant factor, as are acts and situations which may lead to international embarassment or embroilment. The only generalization we would offer is that the act of expatriation must have such a close connection with the cardinal elements of American nationality and allegiance that it is reasonable, with due consideration for the "cherished status" of American citizenship (*Knauer* v. *United States*, 328 U. S. 654, 658), for Congress to impose loss of nationality as a result of the commission of the act.

2. By this standard, a statute prescribing expatriation for those who remain out of the country to avoid military service is a reasonable exercise of the power of Congress to fix the conditions which will result in loss of nationality. The problem of draft evaders who remain out of the country in a period of war or national emergency in order to avoid a fundamental obligation of citizenship—service in defense of the nation—is manifestly a serious one. It is rendered particularly grave by the fact that, in remaining out of the

country, such persons put themselves out of the reach of ordinary criminal sanctions which apply to draft evaders within the country. Moreover, these men present a problem in international relations since, so far as other countries are concerned, they remain United States citizens, while, so far as this nation is concerned, they have refused to fulfill the obligations of citizenship.

Ever since the Civil War, the United States has felt the need for legislation of this type. In 1865, even before the "right" to change nationality was spelled out in the Act of 1868,[29] Congress provided for forfeiture of the "right of citizenship" of deserters *and* enrolled draftees who departed from their district or from the United States with intent to avoid draft into the armed forces. Section 21 of the Act of March 3, 1865, 13 Stat. 490.[30] This statute

[29] As noted above (fn. 26, *supra*, p. 49), the Act of July 27, 1868, 15 Stat. 223, Rev. Stat. 1999, gave legislative recognition to the "right of expatriation" as a "natural and inherent right of all people", but did not define what constituted expatriation. It is interesting, though perhaps not too significant, that the 14th Amendment was declared by Congress to be a part of the Constitution on July 21, 1868, and officially promulgated by the Secretary of State on July 28, 1868, one day after enactment of the expatriation act.

[30] "* * * [A]ll persons who have deserted the military or naval services of the United States, who shall not return to said service, or report themselves to a provost-marshal within sixty days after the proclamation hereinafter mentioned, shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United

apparently decreed loss of citizenship even if the evader did not leave the jurisdiction of the United States.

The constitutionality of this 1865 Act was squarely and extensively considered and its validity upheld in *Gotcheus* v. *Matheson,* 58 Barb. 152, 155–160 (reversed on other grounds, 61 N. Y. 420), the court relying upon the constitutional powers of Congress with respect to the armed forces (Const. Art 1, section 8, subd. 11 and 13). The validity of the Act and its effectiveness as an expatriation statute was assumed in utterances of this Court, of other courts, of Attorneys General, and of other administrative officials, dealing with questions under this legislation. See III Hackworth, *Digest of International Law* (1942), pp. 276–279; *Kurtz* v. *Moffitt,* 115 U. S. 487, 501 (in which the effectiveness of the forfeiture of citizenship of deserters was held dependent, apparently, only upon a court-martial's finding of the fact of desertion); *In re Carver,* 142 Fed. 623, 624 (C. C. D. Me.); *United States* v. *Snow,* 27 Fed. Cas. (No. 16,350) 1255, 1256 (E. D. Tenn.); *Cavender* v. *United States,* 8 C. Cls. 281, 282; *Citizenship of Grover Cleveland Bergdoll,* 39 Op. A. G. 303; *Holt* v.

States, or of exercising any rights of citizens thereof; and all persons who shall hereafter desert the military or naval service, and all persons who, being duly enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered, shall be liable to the penalties of this section. * * *."

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Holt, 59 Me. 464, 465–466; *Severance* v. *Healey,* 50 N. H. 448, 451; *McCafferty* v. *Guyer,* 59 Pa. 109, 110, 113, 119, 123; *Huber* v. *Reily,* 53 Pa. 112, 119.[31] The rationale of the legislation has been stated in *State* v. *Symonds,* 57 Me. 148, 150: "[T]he object of the section in question [is] to prevent the offense of desertion by depriving the offender of his rights as a citizen of the United States. It is clearly within the constitutional province of the legislative department of the national government to define and prescribe the rights of citizenship of the United States, and to declare their forfeiture, as a penalty for deserting the army in a death-struggle of the government for the preservation of its nationality."

This 1865 statute was amended in 1912 to make it inapplicable in times of peace (Act of August 22, 1912, 37 Stat. 356), and it remained in effect until repealed by Section 504 of the Nationality Act of 1940 (54 Stat. 1172).[32] Thus, the statute involved here (Section 401 (j)) had behind it

[31] See also the Report of the Cabinet Committee which prepared the initial draft of the Nationality Act of 1940 (fn. 17, *supra,* p. 39). Hearings before the Committee on Immigration and Naturalization, House of Representatives, 76th Cong,. 1st Sess., on H. R. 6127 superseded by H. R. 9980, at pp. 491–492 (see also comments of Mr. Flournoy at Hearings, *ibid.,* p. 132–133, 186–187).

[32] Section 401 (g) of the 1940 Act provided for expatriation of those deserting the armed forces in time of war (54 Stat. 1169). This provision is apparently the reason for the total repeal of the 1865 Act which dealt both with deserters and with draft evaders.

the support of many years of history. When it was enacted in 1944, conditions incident to World War II revealed a special need to reinstate the provision for draft-evaders. H. Rep. No. 1229, 78th Cong., 2d Sess., which accompanied the bill which became Section 401 (j), spells out the circumstances, at pp. 1–2:

> It is, of course, not known how many citizens or aliens have left the United States for the purpose of evading military service. The Department of Justice discovered that in the western district of Texas, in the vicinity of El Paso alone, there were over 800 draft delinquents recorded in the local Federal Bureau of Investigation office, born in this country and, therefore citizens, who had crossed the border into Mexico for the purpose of evading the draft, but with the expectation of returning to the United States to resume residence after the war.

In these circumstances, Congress cannot be charged with unreasonable or arbitrary action. Conscientious scruples aside, readiness to serve in the country's armed forces in time of war or emergency has always been a cardinal element of American citizenship. As monuments throughout the land attest, the country's demand upon the citizen-soldier has been deemed the highest call to duty. When the draft-evader adds lurking abroad to his willful repudiation of this obligation, he cannot challenge Congress' dissolution of

the ties of allegiance between him and the nation. For not only has he rejected his highest duty of citizenship and kept himself beyond the reach of the American criminal sanctions designed to compel him to fulfill that duty. He is also, in effect, choosing whatever protection he may obtain from another country, as against the protection of the United States and it correlative obligations. This is at least as much the outward manifestation of a preference for another country as the marriage to an alien (within the United States) involved in *Mackenzie* v. *Hare,* 239 U. S. 299, or the mere five-year foreign residence involved in *Lapides* v. *Clark,* 176 F. 2d 619 (C. A. D. C.), certiorari denied, 338 U. S. 860. It is certainly a more decided repudiation of allegiance to this nation than those two acts of expatriation, or the act of voting in a foreign election. One who intentionally chooses foreign residence in place of the military burdens of citizenship is hardly in a position to assert that Congress has acted unreasonably in drawing conclusions from his choice. It was not by chance that the first federal expatriation statute was the 1865 Act dealing with deserters and draft-evaders. Repudiation of the citizen's duty to help preserve the nation in time of war has traditionally been regarded as cause for severing the cords of allegiance.

CONCLUSION

For these reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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NOVEMBER 1955.

war with permission of competent military or naval authority, prior or subsequent to [January 20, 1944], shall be deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom; or

(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction; or

(i) Making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

* * * * *

SEC. 403. * * *

(b) No national under eighteen years of age can expatriate himself under subsections (b) to (g), inclusive, of section 401.

* * * * *

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DEC 8 1955
HAROLD B. WILLEY, Clerk

REME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 111

DANIEL CASTANEDA GONZALES,
Petitioner,
vs.
LANDON, District Director of Immigration and Naturalization of District No. 16, et al.

T OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 111

DANIEL CASTANEDA GONZALES,

Petitioner,

vs.

H. R. LANDON, District Director of Immigration and Naturalization of District No. 16, et al.

PETITIONER'S REPLY BRIEF

Preliminary Statement

Respondents' argument will be here answered in the order made by them.

I

The Evidence Was Not of the Clear, Unambiguous, Unequivocal Quality Which the Government Must Produce in Order to Expatriate an American Citizen. (Reply to Respondents' Point I, pp. 16-26.)

A

The Trial Court Erroneously Treated the Burden of Proof As Being on Petitioner to Show No Expatriation Rather Than on the Government to Prove Expatriation

Respondents, while recognizing (p. 19) that the burden of proving loss of citizenship is on the government, are

incorrect in their assertion that the trial court recognized and understood this rule and that it correctly held the government to its burden.

It is true that at first the court seemed to recognize that the government had the burden of proving loss of citizenship.[1] However, it is manifest that, just as in a previous case the government attorneys had "sold" (R. 28) the court on a point of law, so had they succeeded in getting the court to incorrectly change its mind here. Thus at the time in the proceedings when the court was inquiring as to where lay the burden of proof (R. 20):

> "The Court: And whose burden is it to prove that he stayed out of the United States for the purpose of evading military service?"

the position of the government was that it was the plaintiff's (R. 20):

> "Mr. Grean: The plaintiff has that burden. The burden is on the plaintiff to prove his right to a judgment of nationality from this court . . ."

This was the precise position which the Court took when it came time for judgment (R. 33):

> "The Court: . . . I feel that the plaintiff failed to make a case here. I think that he has not established his citizenship. . . ."

With the court thus taking the erroneous view that the plaintiff, admittedly born in the United States (R. 7, 8), has the burden of "establishing" his citizenship, or conversely, that he has the burden of establishing that he has

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[1] R. 21: "The Court: . . . (H)aven't you a burden to prove that he has lost his citizenship."

not lost his citizenship, rather than the burden being on the government to establish that he has lost it, the error of the court in failing to properly appraise what evidence the government did present, is understandable and clear.

Before discussing the evidence, however, we turn our attention to the erroneous contention of the government (pp. 23-26) that in this type of case loss of citizenship can be decreed on the basis of admissions of a party alone without corroboration.

B

Out of Court Admissions Alone of a Party, Without Corroboration, Are Not Sufficient to Strip One of His United States Citizenship

The rule of law to be here discussed is important to the decision in this case because without the so-called admissions of petitioner,[2] there is no evidence in the case of any kind upon which to base even a conjecture that the operative facts required by Section 401(j) of the 1940 Act were present here.

The government concedes (pg. 26, f. n. 9) that in a criminal case, corroboration is necessary, but argues (*ibid*) that that rule is not applicable to civil cases, or at least not to this "civil proceeding" (Cf. Government's Brief in Opposition to Petition for Writ of Certiorari, pg. 6, where it also concedes that even in some non-criminal cases, corroboration is necessary). But considering the enormity of the punishment sought to be here visited upon petitioner, and the fact that the sanctions are penal and not civil, we submit that this is a type of "non-criminal" proceeding in which corroboration should certainly be required.

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[2] We will discuss below how even these so-called admissions do not measure up to the standard of proof required in a case such as this.

In *Barber* v. *Gonzales*, 347 U. S. 637, 642, this Court said that:

> "Although not penal in character, deportation statutes as a practical matter may inflict 'the equivalent of banishment or exile' (citation) and should be strictly construed."

In *Bridges* v. *Wixon*, 326 U. S. 135, 154, the court said:

> "That deportation is a penalty—at times a most serious one—cannot be doubted."

The case at bar is one in which the government is calling for forfeiture, hence it is penal in nature (cf. Chairman Russell's argument during the debate in Congress on the section (Pet. Op. Br. 7) which makes it very clear that Congress was calling for and decreeing punishment) and the same considerations (there should be no error based on untrue confessions, the unreliability of even "voluntary" statements when made during the confusion of official interrogation, the experience of courts and their knowledge that a number of false confessions are voluntarily made) which impelled this Court to emphasize the rule in criminal cases (*Smith* v. *United States*, 348 U. S. 147, 152-154), are equally applicable here.

Citizenship is here in issue; this is a precious right. The sanction of criminal punishment—loss of liberty by being in jail—is for most, small hurt, compared with the greater punishment of loss of citizenship. Cf. Justice Jackson, concurring in *Edwards* v. *California*, 314 U. S. 160, 182 where he pointed out the protection given to Paul because of his Roman citizenship, and where he said that he supposed none of this Court "doubts that the hope of imparting to American citizenship some of this vitality was the purpose of" the declaration in the 14th Amendment

as to who are citizens. Cf. also, petitioner trying to impart the same thought to the Immigration Officers during their interrogation of him in 1952 (Exhibit "A", 24):

> "The law will punish a criminal and after he has been punished he has paid his debt to society. I feel that under the same conditions I should be punished and allowed to pay for my crime or whatever I am charged with."

Moreover, as the government has recognized (Br. in Oppos. to Certiorari, pg. 6), even in some civil cases corroboration is necessary. Wigmore on Evidence (4 (3d Ed.), § 1055 and 7, § 2075) refers to such issues as marriage, paternity, divorce, an alien applying for naturalization as being among them. Surely the evidentiary base for stripping away citizenship should be equally as strong as that required for an alien to become a citizen. This is especially so in view of this Court's decisions in *Schneiderman* v. *United States,* 320 U. S. 118, 125 and *Baumgartner* v. *United States,* 332 U. S. 665, 670 establishing the strict rule of governmental proof required.

The necessity for the rule that corroboration is required in this case is made the more clear when it is noted that the precise acts required for the operation of Section 401(j) are likewise made criminal under Section 11 of the 1940 Selective Service Act (50 USC Appx. 311).[2a] Thus, if corroboration is not required, it will mean that in a case where a greater penalty, not only can, but must be imposed, and in a case where a citizen is not protected by the safeguards of indictment, jury trial, etc., a lesser quantum of proof is required. We submit that such a state of the law is

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[2a] The corresponding sections in the law today are Sections 349(a)(10) of the Immigration and Nationality Act of 1952 (8 USC 1481(a)(10) and Section 12 of the Selective Service Act of 1948 (50 USC Appx. 462).

arbitrary and unreasonable and should not be permitted.

We do not believe that the government's suggestion (f.n. 9, pg. 26) that there is corroboration in the testimony at the trial has substance. In making this suggestion, the government blows both hot and cold, for the testimony at the trial completely negates the earlier statements. The government is in error, we submit, when it argues that the statements at time of trial corroborate the admissions made by petitioner before the Immigration Officers within the standards of this court's decision in *Opper* v. *United States,* 348 U.S. 84, 93. In that case this court said that the corroborative evidence the government must introduce must be "substantial" and that it must support the "essential facts" admitted. No such evidence can be gleaned from the testimony at the trial. The essential fact admitted by petitioner before the Immigration Officers, was that made at the hearing in 1947 where he said "yes" in response to the leading question (cf. *Nieto* v. *McGrath,* 108 F. Supp. 150, 154) "Do you admit that you remained outside of the jurisdiction of the United States from September 1944 until April 23, 1946 for the purpose of evading or avoiding training and service in the land and naval forces of the United States?"[3] Nothing that petitioner said at the trial corroborated that admission. Indeed the trial court did not think so, but relied solely on the admission, not believing the testimony at the trial (R. 33), which negated in every way possible that "essential fact admitted."

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[3] As will be seen from the discussion, ante, of the statements before the Immigration Officers, it is significant that this was the only time petitioner made such an admission. Although at the first 1952 hearing (Exhibit A, p. 38) petitioner said "yes" in response to the question as to whether or not at the 1947 *and* 1950 hearings he had admitted that he remained outside the United States for the purpose of avoiding service, this was obviously an incorrect answer. For at the 1950 hearing (Exhibit A, p. 68), he said that he had so admitted at the 1947 hearing "but now I deny it."

C

Petitioner's statements before the Immigration and Naturalization Service were admissible for impeachment only, not as independent, affirmative, evidence

It is clear, of course, that if petitioner's statements before the Immigration Service are not substantive evidence, the government has not even the slightest proof in behalf of its case.

Respondents rely, *inter alia,* on 4 Wigmore § 1048 where the author approves the rule that prior admissions of a party are admissible as substantive evidence. The same author (Vol. 3 § 1018(b)) approves the same rule for prior contradictory statements of a witness,[4] but he takes pains to point out that:

> "The contrary view, (that such statements are not admissible as substantive evidence) however, is the orthodox one. It is universally maintained by the Courts that Prior Self-Contradictions are not to be treated as having any *substantive* or *independent value.*"

In support of his statement of this *universal* rule, Wigmore cites many cases, including this court's decisions in *Southern R. Co.* v. *Gray,* 241 U.S. 333 and *Bridges* v. *Wixon,* 326 U.S. 135.

Moreover, even Wigmore, when he approves in Section 1048 of the admissibility of admissions of a party, warns

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[4] Respondents are in error in their suggestion (Br. 23) that petitioner is confusing the situation here with one where a statement is made by a witness not before the court. As Wigmore points out (Vol. 3, Pg. 688) he is talking about a witness who is before the court subject to cross-examination and where prior contradictory statement is sought to be used not only for impeachment but as affirmative evidence.

against using them as "*equivalent to affirmative testimony* for the party offering it." (Vol. 4, pg. 6.) And he calls attention to the opinion in *Gibson* v. *Boston*, 75 N.H. 405, 75 Atl. 103 as an example of the failure of justice that may occur when any stress is laid on the doctrine of admissions being "affirmative proof."

In explaining his dissent from the universal rule holding prior contradictory statements of a witness inadmissible as substantive evidence (in his first edition, he had previously approved of the orthodox view) Wigmore equated (f.n. 2, pg. 688 of Vol. 3) such a statement with that of an admission of a party.

We submit that because the facts of a case are to, or should, be proved in court, it is enough to permit the receipt of a prior contradictory statement of either a party or a witness for impeachment purposes alone, leaving the facts to be adduced before the tribunal and that just as this court will not permit a witness' prior contradictory statement to be used as affirmative evidence (*Southern R. Co.* v. *Gray*, 241 U.S. 333; *Bridges* v. *Wixon*, 326 U.S. 135; *Hickory* v. *United States*, 151 U.S. 303) so also should it not permit a party's, at least in a case such as this.[5]

D

The Government's proof does not rise to the standard required in this case

The mere fact (Govt's Br. 20) that "the government did not—and ordinarily could not—" produce evidence which is of a strong and convincing nature, not ambiguous and which would leave no troubling doubts, is no reason for relieving the government of its heavy burden. There is no

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[5] Cf. the trial court (R. 21): "(H)ow about taking a man's citizenship away from him on his own admissions. Would that be evidence?"

reason why, in a difficult case, the standard should be relaxed. Indeed, it is precisely because this court would not permit loss of citizenship save where the proof is clear, that it imposed the heavy burden in the first place.

It is manifest that neither court below nor respondents have given appropriate consideration to the facts and circumstances of this case. Not only do they brush aside the fact that petitioner had to stop school in rural Mexico at the age of 10,[6] when his father died (R. 8, 13), that he was the eldest of six children (R. 12); that he lived on a ranch supporting his mother and younger brothers and sisters (R. 13) doing agricultural work (Ibid); that he did not read a newspaper until he came to the United States (R. 13), that he had attended only two movies (Exhibit A, pp. 42-43), significantly, because his mother wouldn't give him the money to go; that he lived near a small town, in a mountainous and remote part of Mexico (Exhibit A, p. 77).

The parental compulsion which is clearly the reason for petitioner's not returning to the United States during his minority is brushed aside. But in this case, involving the deprivation of so clearly a constitutionally protected right as citizenship, the facts in the record surrounding this issue must be considered. (*Baumgartner* v. *United States*, 332 U.S. 665, 671; *Watts* v. *Indiana*, 338 U.S. 49, 51; cf. *Merchants National Bank* v. *City of Richmond*, 256 U.S. 635, 638; *Pierre* v. *Louisiana*, 306 U.S. 354, 358.) Especially does this parental compulsion become the clearer when it is considered that what we have here is a family, in which the father is dead, in a country where the family ties are of the strongest character. (See, Beals, "*America South*",

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[6] It is interesting to note the interpolation "(equivalent to about the sixth grade, U.S. school)." which appears as ostensibly being a part of petitioner's testimony before the Immigration Officers in 1952 (Exhibit A, p. 39).

Lippincott, 1937, pg. 303: "The family is really an overriding institution in Latin America.") For petitioner to have disregarded his mother's will is expecting too much. Under these circumstances, we do not believe it can reasonably be said that he acted voluntarily.

Even disregarding the testimony at the trial where petitioner sought in vain to have the court understand his predicament, and looking solely at his statements before the Immigration officers, we believe it will become clear that petitioner acted solely under parental compulsion and that it cannot be said he acted voluntarily.

From the very beginning, petitioner sought to convey to the Immigration service that he did not return to the United States before 1946 because his mother would not let him. Contrary to the trial court's understanding of the evidence (R. 33), this explanation by petitioner was not made first in court but was made before the immigration officers from the very first time he appeared and each time thereafter.[7] We set forth, at some length, portions of petitioner's statements before the Boards of Special Inquiry.[8]

The first interrogation was at El Paso, Texas on October 2, 1947:

Pg. 78:

> "Q. Then you were unwilling to serve your country during the years of the War prior to April 23, 1946?
>
> "A. No."

---

[7] The trial court said (R. 33):

> "When a boy of that kind comes in and tells me his mother wouldn't let him out of the house, he couldn't come because his mother wouldn't let him out of the house, I don't know how such foolish statements can be made. . . ."

Thus the trial court failed to understand, not only petitioner's true motivation (it called it "foolish") but also where the statements were made.

[8] The references are to the pages in Exhibit A where the questions and answers appear. By correspondence with the Clerk of this Court, the pages in the Exhibit have been consecutively numbered.

Pg. 78:

"Q. Had it not been for your obligation to register in the United States, would you have come to this country during the years 1942, 1943, 1944 or 1945?

"A. I wanted to come to the United States in 1942 *but my mother would not permit me to do so.* I would have come to the United States in 1944 or 1945 had it not been for the requirement to register." (Italics added.)

The second hearing was at El Paso on September 28 and October 5, 1950:

Pg. 68:

"Q. Do you wish to make any other comment regarding this hearing of October 2, 1947?

"A. Yes. I would like to say that *if necessary I can produce my mother here to prove that she would not let me come.*" (Italics added.)

Pg. 68:

"Q. Why did you not obtain permission from your mother to come to the United States in 1943, 1944 or 1945?

"A. I asked her for permission but *she would not give it to me.*" (Italics added.)

Pg. 68:

"Q. According to your statement to the Board of Special Inquiry on October 2, 1947, you admitted that you remained outside of the jurisdiction of the United States from September 27, 1944 until April 23, 1946 for the purpose of evading or avoiding training and service in the armed or naval forces of the United States. What do you have to say to that?

"A. Yes, that is true, but *I first stated that it was because my mother would not permit me to come;* then, I was told that that was not sufficient excuse. (Italics added.)

(Thus note how petitioner was trying to tell the inquiring officers that which they wanted to hear and which he thought would help his case. (Cf. *Ponce* v. *McGrath*, 91 F. Supp. 23, 24 where the court points out the "apparent desire to meet agreement and satisfy the questioner"). So here: petitioner first told the officers that it was because his mother would not permit him, that he did not come to the United States sooner. But when they told him this was not sufficient reason, and after they asked him the devastating leading question, he answered "Yes", obviously thinking that this is what the officers wanted him to say, which they did, and thinking that this was the answer which would help him.)

Pg. 68:

"Q. Why did you not come to the United States to serve in the armed forces of this country after you became twenty-one years of age on July 21, 1945."

"A. I did not have any money with which to move myself."

Pg. 68:

"Q. Do you admit that you remained outside of the United States from September 27, 1944 until April 23, 1946 for the purpose of evading or avoiding training and service in the land or naval forces of the United States?

"A. No. I do not admit that now."

Pp. 68, 69:

"Q. Do you admit that you previously told this Board that you remained outside of the United States from September 27, 1944 until April 23, 1946 for the purpose of evading or avoiding training and service in the land or naval forces of the United States?

"A. Yes. I admit that I stated that at that time, but now I deny it."

Pg. 69:

"Q. Do you admit that you remained outside the jurisdiction of the United States from September 27, 1944 until April 23, 1946 *to comply with the wishes of your mother* knowing that if you would come to the United States you would in all probability have to serve in the armed forces of this country? (Italics added.)

"A. Yes. I knew about that."

The third hearing was on January 9 and 194, 1952. At that hearing these questions were asked and these answers given:

Pg. 39:

"Q. What kind of work did you do in Mexico prior to entering the United States April 23, 1946?

"A. I worked for my mother, farming. We farmed our own parcel of land at the government farm."

Pg. 39:

"Q. Prior to your marriage in 1947, was there any one depending upon you for support?

"A. I had worked before 1946 with my mother farming and contributed to her support, as I lived with her always."

Pg. 40:

"Q. Were you not sufficiently close to El Paso, Texas, that you could have come to the United States prior to 1946?

"A. I explained all about that to the immigration officers at El Paso, Texas, when I was given my hearings. I admitted that I could and the reasons why I didn't—*because my mother didn't wish me to return to the United States* because I was helping support her there. And, *because of that reason, that's why I didn't do so.* I explained all that; they seemed to think that my only reason for not coming was because of being afraid personally of military service. That was not the reason, it was because of my mother's fear of that for me that I stayed there. Since I have come to the United States again, I have enlisted in the California National Guard Reserve. I have a letter here about that." (Italics added.)

Pg. 41:

"Q. Was fear of military service in time of war the only reason that you did not register for United States military training and service prior to 1946?

"A. The only true thing is and the only one I give now is my mother's fear of military service for me. I could have registered for it in Chihuahua, Mexico. I went there two or three times—the capital of the state. It was because of the fear of my mother that I did not do so before 1946."

Pg. 41:

"Q. Did you resolve to return to the United States prior to April of 1946?

"A. Yes, I had; *I had even asked her about my returning,* and told her I had wanted to return. *It was to obey her and her wishes* that I did not return before I did in '46 and during the war." (Italics added.)

Pg. 42:

"Q. Were you aware that you could have registered for United States military service in Mexico prior to 1946, had you desired to do so?

"A. Yes, sir. I later thought of registering for it in Chihuahua, Chihuahua, Mexico, where I went a few times, but as *my mother did not wish me to do so.* I did not do so." (Italics added.)

Pp. 42, 43:

"Q. Did you occasionally attend motion picture shows and go on pleasure trips from Favela to Chihuahua City, Mexico?

"A. I went there a number of times but I didn't go to motion picture shows there except on two occasions. There was a motion picture show in the village of Cuahtemoc close to us at Favela, but to go a distance cost money and *my mother wouldn't give me the extra money for that.*" (Italics added.)

Pg. 49:

"Q. Did you admit before the members of the boards of special inquiry when you were denied admission at El Paso, Texas, in October 1947 and in December 1950, that you had remained in Mexico subsequent to September 27, 1944, for the purpose of evading or avoiding training or service in the armed forces of the United States in time of war?

"A. Well, yes, I think I did. They asked me why I didn't come before 1946 and if I could have come, and if I knew about the war and if I knew I was supposed to come to register for military service. I told him the truth, that I knew all about it and that I didn't do it. I told him it was because *my mother was afraid* for me; *didn't want me to get in the war,* and I knew I should have done that—come to the United States while the war was going on, and that I could have come but I didn't do it. I admitted that but I didn't admit that I was afraid of the war at first. *They said they thought it was because I was afraid and not because my mother was afraid for me so I told them to put down whatever they like then;* maybe that was so. It didn't make any difference anyway because I knew I was supposed to come and I didn't do it." (Italics added.)

Pg. 55:

"Q. Were your statements before the boards of special inquiry of El Paso, Texas, on October 2, 1947, September 28, 1950, and October 5, 1950, true in all respects?

"A. Yes, sir, except that I hesitated to tell that my mother was afraid for me to give military service; that was the cause of my hesitation. *I was not afraid but she was afraid for me and I obeyed her wishes* and didn't do my duty, but I want to say now that I would do that now if I had the chance." (Italics added.)

A consideration of this testimony, taken as a whole, gives an entirely different picture from that conveyed by respondents' recital of the facts.

We submit that parental compulsion on a boy such as petitioner here is not to be lightly dismissed. Cf. *Mendel-*

sohn v. *Dulles*, 207 F. 2d 37 (CA DC 1953) for an example of where the court found that consideration for one's loved one was compulsive and did not render the person's conduct voluntary. That, too, was an expatriation case. The court there said (207 F. 2d at 39): "The Secretary's (of State) argument disregards the duress of devotion. Mendelsohn acted, it seems to us, under the coercion of marital affection, which was just as compelling as physical restraint."[9] See Sorrentino v. Dulles 226 Fed 243 (CA DC 1955)

Certainly the evidence does not comport with a view that petitioner stayed away because of fear for himself and in order to avoid military service rather than because of compliance with his mother's wishes. The record is clear here that petitioner enlisted—he did not await a draft—in the California National Guard in September, 1951[10] (Exhibit A, p. 40). At the time he enlisted he was told he might be subject to active service in the United States Armed Forces (Exhibit A, p. 19). This was precisely during the Korean War.

In the above excerpts we have not referred to the testimony at the trial itself. This, because we have endeavored to show and believe we have, that petitioner's lone admission in 1947 cannot stand up in the light of all the other questions and answers, to permit of a decree of expatriation.

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[9] It is noteworthy that in at least three other cases before the Immigration and Naturalization Service itself, (Matter of G— M—, 2 I & N Dec. 861, Matter of M, 2 I & N Dec. 910 and Matter of H— M—, 6603877, May 1947) persons who did not register with the American Consulate in Mexico or return to the United States, although they knew of the obligation so to do, were held not to have expatriated themselves under 401(j) because they stayed in Mexico to continue to support their families; this despite the fact, as in M—, for example, that the citizen had stated that he had voluntarily remained outside the United States to avoid training and service in the armed forces of the United States.

[10] He had registered the first day he came to the United States in April 1946 (Exhibit A, p. 76, 77).

Nevertheless, a reference to petitioner's testimony at the trial is not amiss, because it shows and tends to explain that all along petitioner was trying to tell the Immigration officers as well as the court that he did not come to the United States before 1946 because of his mother's control during his minority.

Thus the court asked petitioner (R. 9) "Why didn't you come before?" (1946) Petitioner answered (Ibid): "Because my mother don't let me."

When asked if he had answered in 1947 that he had known of the war since 1942, he again said *inter alia*, (R. 14): "I also answered that I wanted to come to the United States before but my mother did not permit me to leave the house."

At another time, petitioner said (R. 16):

> "There is a little confusion—something I want to get straight here. I also want to say that my mother wouldn't permit me to go out of the house. Wanted me to remain at home all the time."

And again, this between the court and petitioner (R. 17):

> "A. My intention has always been to come back to the United States when I was quite young but my mother wouldn't let me.
>
> "The Court: Was that your answer to the question of the Board?
>
> "The Witness: The answer is just the one I said from the beginning."

And (R. 18):

> "A. That is the question they asked me. The answer was that because my mother didn't let me and not because I was afraid of the war."

And (R. 19):

> "My answer that I gave at all times was that she did not want me to leave the house at any time."

And (R. 26):

> "My mother never mentioned anything about fear. The only thing she mentioned was she didn't want me to go out of the house."

While the trial court said (R. 33) he did not believe petitioner at the trial and that "his testimony before the immigration officers was far more accurate and more near the truth," in judging this testimony before the immigration officers, we believe but two conclusions are forthcoming. (1) that petitioner affirmatively showed that he did not act voluntarily and (2) that at the very least, the government's proof does not have the clear cut ring which it must and should have in a case such as this.

In *Perkins* v. *Elg*, 307 U. S. 325, 337, this Court, speaking through Chief Justice Hughes, said that

> "Rights of citizenship are not to be destroyed by an ambiguity."

In *Kawakita* v. *United States*, 343 U. S. 717, 728, this court refused to construe Section 401(d) of the 1940 Nationality Act "so as to provide treacherous ground for the loss of rights of citizenship."

In *Schneiderman* v. *United States*, 320 U. S. 118, 122 this court said that in an action concerned with "depriving one of the precious right of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen."

We submit that the application of these principles to the evidence adduced by the government calls for decision in favor of petition.

As the Board of Immigration Appeals said in a case where it refused to find expatriation under section 401(j) (Matter of G — R —) 3 I & N Dec. 141, 154:

> "(W)here a person's conduct permits of two or more reasonable inferences, one unfavorable and the other or others favorable, we ought not to expatriate that person through a process of reasoning that gives no weight to the favorable inferences and that reaches the result by pyramiding one unfavorable inference upon another."

II

Section 401(j) of the Nationality Act of 1940, as Amended, Does Not Apply to the Facts of this Case. (Reply to Respondents' Point II, pp. 26-42.)

Respondents state (Br. 26) petitioner's position too broadly.[11] What petitioner is saying is that Congress did not intend and Section 401(j) should not be construed to apply to the facts of this case where a boy was taken as an infant by his parents to a foreign country, lived there all his life and complied with the laws of that country in relation to military duty in accordance with an agreement between this country and that pursuant to "the mutual desire of our respective countries to unite their efforts as members of the United Nations in prosecuting the war and achieving victory." (57 Stat. at 977) recognizing that such situations would arise and should be thus handled.

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[11] They are also incorrect in their assertion that petitioner did not make the point below. See R. 26, where petitioner's counsel argued: "What Congress had in mind was these people who departed from the United States during the war expected to remain outside until the war was ended."

Respondents seek to foreclose consideration of Congressional intent by reliance on that part of the language of the statute which says "or remaining." But, as this court has had occasion to point out (*Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479):

> " . . . Words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on "superficial examination." ' "

Respondents point to no legislative history contrary to, nor remotely modifying, that which petitioner has previously called to the attention of the court (Pet. Br. 20-22). Indeed the Immigration Service itself has called attention to additional Congressional statements which support petitioner. Thus, In the Matter of A — H —, II Administrative Decisions under Immigration and Nationality Laws of the United States (I & N Dec.) 390, 392, attention was called to the additional statement of Congressman Mason that "Anyone who *left* the country . . . would lose his citizenship." (Italics added.) Attention was also called (ibid) to Congressman Rowe's statement that "I understand by that that *if they are within the qualifying age* (for service in the armed forces) and an emergency exists, then it is determined that they *left* the country for that purpose." The decision also pointed out the additional statement of Senator Russell, chairman of the Senate Committee, concerning aliens:

> ". . . It (the bill) further provides that any alien who is subject to military service under the terms of the Selective Service Act, and who *left* this country to avoid military service, shall thereafter be forever barred from admission to the United States . . . This bill would de-

> prive *such persons* as are citizens of the United States of their citizenship . . . " (Italics added.)

Respondents characterize (Br. 27) these clear enunciations (and those at pages 20-22 of Petitioner's Brief) of the purpose of the bill as "more or less informal utterances in debate." But they are more than that; they are the explanation given to Congress by the Chairman of the Senate Committee which reported the bill favorably for passage and by the congressmen (Dickstein) who introduced the bill. And in addition respondents disregard the anything but "informal" letter of their then superior, the Attorney General of the United States, who was the one who asked for the legislation in order to get at those "many citizens of the United States who have *left this country* for the purpose of escaping service in the armed forces." (Italics added.) (Pgs. 2, S. Rept. 1075 and H. Rept. 1229, 78th Cong. 2d Sess.)

Moreover, in a decision interpreting the section (Matter of V— D—, 2 I & N Dec. 417, 424), the Attorney General on appeal said:

> "The act seeks to prevent an *exodus from* the United States for the purpose of avoiding military service . . ." (Italics added.)

This language of the Attorney General is the more significant by reason of two earlier decisions by the Board of Immigration Appeals (Matter of C—, 56175/45 (Feb. 23, 1945) and Matter of J—, 56172/580 (Nov. 2, 1945)) holding respectively that the expatriating provisions of the Act (H. R. 4257, 78th Cong.) do not apply to a citizen army deserter because at the time of his departure and staying out of the country he was not subject to the Selective Training and Service Act and that the exclusionary pro-

visions of the Act do not apply to an alien who at the time of his departure was not subject to the Selective Training and Service Act because he was a non-declarant alien under that Act. Certainly Matter of C, at least, applies here for petitioner was taken from this country at the age of 2.

Although respondents seek (Br. 28-36) to distinguish away the effect of the January 22, 1943 agreement between the United States and Mexico and though they do concede (Br. 35) that the agreement and Section 401(j) can be read harmoniously, the effect of their argument is to read the Agreement out of existence and to proceed as though it were not there.

The question is not, as respondents seem to believe (Br. 29, 32, 34), whether, by reason of the agreement, citizens living abroad were to be exempted from military control by this country. The agreement (Par. IX, thereof, the pertinent part of which appears at pages 23 and 24 of Petitioner's Brief; also f.n. 9, pg. 31 of Respondents' Brief) clearly contemplates that they were not. But this does not answer the problem. The point is that in strictly construing the expatriating statute, as must be done, is it reasonable to conclude, specifically as regards Mexico with whom the Agreement was made, that Americans who comply with what was contemplated by the Agreement, namely register for military service in Mexico, should lose their United States citizenship by not also returning to the United States for service.[12] Whether the lesser criminal penalty for failure to register in Mexico subsequent to Presidential Proclamation 2597, of October 23, 1943, could be visited is not necessary to decide. Certainly he could not lose his United States citizenship by reason of this one fact.

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[12] Incidentally, the facts concerning petitioner's registration for Mexican military service were not first brought out at the trial (R. 16) as respondents suggest (Br. 29). They were developed at the hearings before the Immigration Service (Exhibit A, pp. 41, 42, —).

Respondents speak of (Br. 28, 34) the supposed loss to the United States by petitioner's remaining outside the United States. But here again, they disregard the Agreement. It is to be remembered that the war was a United Nations endeavor, at least by the time the Agreement was entered into. Congress must be deemed to have known that there were many boys like petitioner here who had lived all their lives in Mexico and would be expected to perform their service with that country. Paragraph VI of the Agreement which provided for the interchange of information between the two countries as to the registration or induction of the respective nationals of the other country, was sufficient to protect our interests in the event we wanted to exercise the rights given us by Paragraph IX.

It is to be remembered that when petitioner did register for Mexican military service, he stated that he had been born in the United States (Exhibit A, pp. 44, 45). Presumably the Mexican authorities lived up to their Agreement under Paragraph VI and reported the fact of petitioner's registration to American authorities. There is nothing to indicate that we requested petitioner's release so that he might be inducted into the United States Armed Forces.

The spectre of loss to the United States of a wanted soldier is a non-existent fact raised by respondents, as is the "international problem" raised by them. The so-called international problem had been well provided for by the Agreement, and Congress must be presumed to have known of it and to have been content to let it rest there.

As to the loss to us of a soldier, this too is a hypothesis based on non-existent facts. As the cases cited in footnote 9, *supra*, demonstrate, where a person living in Mexico has no intention whatever of returning to the United States, but simply lives in Mexico because he wants to live there,

no contention is made that he lost his citizenship under Section 401(j). Yet the loss in manpower to the United States is the same.

With respect to the 21 year question, we believe that *McGrath* v. *Abo*, 186 F. 2d 766 (CA 9, 1951) cert. den. 342 U. S. 832, represents the correct law on the point. The ruling in the case at bar need not turn on a decision by this Court on the question, of course, because petitioner was away from the United States 9 months after he became 21. This fact, however, is important on the issue of voluntariness discussed above.[13]

III

Section 401(j) Is Unconstitutional. (Reply to Respondents' Point III, pp. 42-62.)

Respondents' grasp on "an implied attribute of sovereignty" (Br. 44) as authority for the right of Congress to impose loss of citizenship, misses the point. It may be conceded that each sovereign has the right to say who shall be citizens, who shall not and how, in accordance with its own law, that citizenship may be given up or even lost. But that does not solve nor reach the problem of this case. Each country exercises that right in accordance with its own institutions and laws. In this country this right of the sovereign has been exercised by the people in their Constitution when they said that persons born in this country are citizens of the United States. This is a complete and all inclusive status. The people have not delegated to Con-

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[13] We cannot refrain from pointing out respondents' lack of confidence in Congress' ability to accomplish the ends it seeks. No only would respondents have the Agreement between Mexico and the United States read out of existence, but they also attribute Congress' failure to amend section 403(b) of the 1940 Act to "oversight" and "forgetfulness". (Resp. Br. 41.)

gress [14] any power to change it, absent consent. If respondents are correct that Congress has the power, based on some theory of "implied" power, to impose loss of that status after its having been acquired, it would logically follow that it has the same "implied" power to prevent its acquisition in the first place, for the same "attribute of sovereignty" would be involved. We do not think that even respondents would, nor could they, if they would (*United States* v. *Wong Kim Ark,* 169 U. S. 649), contend that Congress has this latter power. Of course the nation is sovereign and has all the attributes thereof. However, the "Government is limited . . . by its own Constitution." (*Choctaw Nation* v. *United States,* 119 U. S. 1, 7 Sup. Ct. 75, 30 L. Ed. 306, 315.)

Following respondents' theory of "implied attribute of sovereignty", we suggest that it is likewise such an attribute of sovereignty, for example, to provide for the mode of judicial trials. But we do not think that therefore it can be contended, in the face of the 6th Amendment, that Congress could impose trial without jury in a criminal case, absent consent.

Mackenzie v. *Hare,* 239 U. S. 299, is, of course, the case upon which respondents must and do rest.

But that case is distinguishable from the facts at bar. Or, if it is not, it is anomaly in present day law, a carry-over from a long forgotten past, and should not be followed today.

In the *Mackenzie* case the court agreed (239 U. S. at 311) "that a change of citizenship cannot be . . . imposed . . . without the concurrence of the citizen." It spoke of the statute (34 Stat. 1228) as dealing (239 U. S. at 312)

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[14] Cf. the delegation to Congress of the power "to establish an uniform Rule of Naturalization." (Art. I, sec. 8, cl. 4). See also *Lapides* v. *Clark,* 176 F. 2d 619, (CA DC 1949), cert. den. 338 U.S. 860.

"with a condition voluntarily entered into, with notice of the consequences." That may have been the case in the facts then before the court. The statute was enacted in 1907; plaintiff was born in California in 1909 and lived there all her life. It may well be that she concurred and had notice of the consequences. Certainly under the then prevailing law that when a woman marries, she merges her identity with the husband (239 U. S. at 311), it might with plausibility be said that she had notice that when she married an Englishman she "elected" (239 U. S. at 312) to expatriate herself. The same cannot be said of the legislation at bar, with respect to petitioner at any rate. While it may be that for the purposes of criminal law, petitioner can be presumed to have knowledge of the Selective Service Act passed in 1940, at a time when he had been absent from the country 14 years since he had been two years old, we agree with the Board of Immigration Appeals in Matter of G— R— (3 I & N Dec. 141, 149, f. n. 5) that "he, (n)or any other applicant, can (not) be charged with such knowledge for the purpose of determining whether or not he had lost his American citizenship under Section 401(j) of the Nationality Act of 1940, as amended."[15] Actual knowledge, of course, is out of the question on the facts of the case at bar. To the extent, therefore, that *Mackenzie* requires "notice of the consequences", the case supports petitioner.

Moreover, the rationale of Mackenzie is based on the "ancient principle" of "the identity of husband and wife." (239 U. S. at 311). This is an ancient principle which has outgrown its reason for existence, even as Congress recognized when it repealed this ground as a cause for expatri-

[15] The distinction is a profound one. For technical violation of the Selective Service Act, probation can be granted or a small fine imposed, or a pardon granted. For an act resulting in loss of citizenship, there is no reprieve, no middle ground. The loss is fatal, permanent.

ation in 1922 (42 Stat. 1022). We think that *Perkins* v. *Elg*, 307 U. S. 325 represents a departure [16] from the doctrine of the singleness of the wife and minor children with the husband and father, and we venture to suggest that if the *Mackenzie* case were presented to the court today, the ancient principle would not be suffered to take away Mrs. Mackenzie's birthright.

Furthermore, as will be seen below, the government has abandoned (Br. 57) the theory upon which *Mackenzie* and the other cases the government cites depend, namely the theory that by the doing of such and such an act the consent of the citizen, or his concurrence, can be spelled out, or implied. By offering its generalization (Br. 57) the government is contending for the bald proposition that the consent of the citizen is not necessary, that there need be no concurrence, that there need be no notice of the consequences. Its contention is simply that, like crime, Congress can impose punishment, only this time without the traditional safeguards.

Savorgnan v. *United States*, 338 U. S. 491 was an actual case of voluntarily taking on the allegiance of another country, renouncing (see pg. 495, n. 3) her American citizenship and taking up residence in the country of her choice. No question of constitutionality was involved. In *Moser* v. *United States*, 341 U. S. 41, 47 this court characterized Mrs. Savorgnan's actions and claim as simply "sign(ing) one thing and claiming another. To the extent that the dictum in *Savorgnan* stands for the proposition that consent and intent are irrelevant in expatriation cases, considerable doubt has been cast thereon by this court's decisions in *Moser* as well as in *Kawakita* v. *United States*, 343 U. S. 717, 727 where this court held that it was for the jury to deter-

[16] Despite its *dictum* (at 329) that Congressional action may result in loss of citizenship.

mine the fact as to whether petitioner there intended, by the various acts he performed to renounce his American citizenship.

We do not consider that petitioner's reliance on *United States* v. *Wong Kim Ark*, 169 U. S. 649, is misplaced. We agree that Judge McLaughlin correctly apprized the situation in *Okimura* v. *Acheson*, 99 F. Supp. 587, 590 where he said that the teachings of that case "seem to have been occasionally forgotten or whittled down." We believe there has been enough of that and that United States citizenship should be restored to the Constitution where the people put it.[17]

The necessity for this restoration is seen from respondents' candid assertion (Br. 48) that Congress has been increasingly concerned "with removing from the body of our citizenship those Americans who, by their voluntary acts, have shown that they *should* no longer be citizens of this country even if they desire to remain such."! (Italics added.) This is the crux of the matter. By what right has Congress, in the face of the clear mandate of the Constitution as to who "should" be citizens, to say that certain persons "should" not? Respondents' boot-strap argument

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[17] In *Terada* v. *Dulles*, 121 F. Supp. 6, 7 (DC Haw 1954) Judge McLaughlin, after citing the *Savorgnan* and other cases which seem to sustain Congress' power, said:

> "With due respect to the identify, age, and volume of authorities relied upon, I do not believe they correctly state the law. The error should not be further perpetuated. Below the surface, the real issue constantly overlooked is whether Congress has the uniiateral power to take away citizenship granted native-born by the Constitution itself. If it has not, may it find a voluntary renunciation by reading into the doing of such colorless acts as it may specify, today or tomorrow, a really non-existent intent or consent to forfeit a birthright? In brief absent the factor of consent of both the sovereign and the individual, is not native citizenship indestructible? If so, should not Congress confine itself, to punishing offending citizens for treason and lesser crimes?"

that since Congress has done it, hence it is valid, is of course, no argument at all.

Respondents make the issue clearer when they frankly (Br. 49) state that the enactments are "provisions for *compulsory* expatriation."[18] (Italics added.) This is the same thing as saying that one can compulsorily be deprived of the right to representation by counsel. The assertions are simply contrary to the Constitution.

Respondents' efforts (Br. 54-62) to spell out Congress' power to decree compulsory expatriation based upon "conditions of national moment," (Br. 56) only serve to emphasize Congress' lack of authority in this field. It is to be expected that whenever Congress passes public legislation, it does so because of "conditions of national moment." The road down which this argument takes us is illustrated by respondents' suggestion (Br. 57) that "lack of . . . support of this country" is sufficient to permit Congress to lower the ax of expatriation. Free speech considerations of the First Amendment aside, it may well be that in not supporting his country on a given issue, a citizen will be practicing the highest degree of citizenship. Whether he should be commended for this is beside the point. He cannot, certainly, be expatriated.

Respondents offer (Br. 57) a generalization as to the limitation on the power of Congress to impose expatriation and then they attempt to justify (Br. 61) the legislation here on the ground that "readiness to serve in the country's armed forces in time of war or emergency has always been

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[18] Rather than try to spell out some vague theory of consent to expatriation by the doing of this or that act. The American Civil Liberties Union, in its brief, *amicus curiae*, seems to make such a distinction in its argument that no such conclusion can be arrived at from the doing of the acts set forth in Section 401(j). This is really a 5th Amendment, Due Process, argument. We agree that the legislation is bad on that count, as well. But we believe that a decision of unconstitutionality on a broader base is called for.

a cardinal element of American citizenship." But so also has and is the readiness not to engage in narcotic traffic, or in assassination of government officials or in kidnapping and carrying across state lines, or in running away and resisting extradition, or in murdering, counterfeiting, smuggling, etc., etc. Congress should not be permitted to circumvent the constitutional safeguards offered those accused of crime, (indictment, trial by jury, etc.) by decreeing greater punishment by this so-called civil method. Merely being a bad citizen does not give Congress the power to say that he shall not be a citizen at all. Moreover, it is to be remembered that Congress has decreed loss of citizenship for doing acts which were for the benefit of this country (See *Acheson* v. *Kuniyuki*, 189 F. 2d 741, 190 F. 2d 987, cert. den. 342 U. S. 942). That traditionally the acts set forth in the statute have been regarded as cause for "severing the cords of (constitutionally endowed) allegiance," (Resp. Br. 62) (parentheses added) is not an impressive argument. (Cf. *United States ex rel Toth* v. *Quarles*, — U. S. —, 24 Law Week 4005, 4008, Nov. 7, 1955). It is the Constitution that controls here; not Congress.

Conclusion

The judgment below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1955

No. 111

DANIEL CASTANEDA GONZALES, *Petitioner,*

vs.

H. R. LANDON, District Director of Immigration and Naturalization of District No. 16, and HERBERT BROWNELL, JR., *Attorney General of the* United States, *Respondents,*

BRIEF OF AMICUS CURIAE

(Francisco Mendoza-Martinez)

I.

INTRODUCTION

A. Interest of This Amicus Curiae:

This amicus curiae is plaintiff in an action designated as Francisco Mendoza-Martinez v. Argyle R. Mackey, The Commissioner of Immigration and Naturalization, and Herbert Brownell, Attorney General of the United States, in the United States District

Court for the Southern District of California, Northern Division. In this action plaintiff sought a judgment declaring him to be a United States citizen. All operative facts necessary to the application of 401-J of the Immigration and Nationality Act of 1940 were stipulated to by the plaintiff, and it was conceded on behalf of the United States that plaintiff was a native of the United States. Plaintiff's sole ground for his action was his contention that the said Section 401-J is unconstitutional. Judgment for the defendants was rendered in the aforesaid court, and plaintiff has filed his notice of appeal to the Court of Appeals for the Ninth Circuit. In the case now before this Court it would appear that the principal issue is the constitutionality of the same section. Accordingly it seems probable that all of the rights of this amicus curiae will be determined in the instant case rather than in his own.

B. The Scope of This Brief:

Proponents of the constitutionality of the statute here challenged, and its companion subsections, have advanced two independent and unrelated theories in support of their contention: On one hand it is alleged that Congress is empowered by the doctrine of implied powers, or by the fact of its sovereignty, to regulate the divestment as well as the investment of citizenship; and on the other it is conceded that expatriation can be accomplished solely by voluntary choice, but it is contended that Congress is empowered to define those acts by which that voluntary choice shall be made known.

The first position, deriving its principal strength from *McKenzie* v. *Hare*, 239 U.S. 299, we leave to

others of like interest for refutation, believing that this Court will allow no sophistic avoidance of its vigorous announcement in 1898 that Congress is without power to abridge the right of citizenship acquired by birth. (*United States* v. *Wong Kim Ark,* 169 U.S. 649)

It is to the second proposition that we address ourselves here, it being our purpose to implement by further analysis the succinct summation of Presiding Judge McLaughlin of the District Court of Hawaii: "*The right of expatriation is not to be converted into a liability by Congressional fiat.*" (*Okimura* v. *Acheson,* 111 Fed. Supp. 303)

C. By Way of Preamble: The Abridgement of a Fundamental Right Is in Issue Here

In *Miranda* v. *Clark,* 180 F.(2d) 257, and again in the instant case, the Ninth Circuit Court of Appeals has declared itself bound by the provisions of the statute "unless it can be said that they are clearly unconstitutional, a conclusion without rational foundation." We submit that this application of the ordinary presumption of constitutionality should be counter-balanced by the same liberal construction in favor of the citizen and careful weighing of any abridgment which this Court has insisted upon where fundamental liberties are involved. (*Marsh* v. *State of Alabama,* 326 U.S. 501; *Thornhill* v. *Alabama,* 310 U.S. 88) Basic as are those specially guarded liberties, they are rooted in turn in the right of citizenship itself. Surely it would be a small gain to this petitioner that his right to speak and worship freely remained inviolate, if he were denied his right to remain on this soil to exercise it. It would seem proper, therefore,

that the deprivation of citizenship sought to be sustained here should be subjected to the most careful scrutiny.

II.

ARGUMENT

The Section Here Complained of Is an Unconstitutional Conclusive Presumption

It has repeatedly been held that the relinquishment of citizenship is a voluntary act. (*Savorgnan* vs. *U. S.*, 338 U.S. 491; *Perkins* v. *Elg.*, 307 U.S. 325; *Tomoya Kawakita* v. *U. S.*, 190 F.(2d) 506, affirmed 343 U.S. 717; *Doreau* v. *Marshall*, 170 F.(2d) 721; *Lehman* v. *Acheson*, 206 F.(2d) 592)

Section 401-J of the Immigration and Nationality Act of 1940, together with its companion sections and their predecessors and successors, has been most frequently justified as merely a Congressional definition of the means by which this voluntary expatriation shall be accomplished. (Thus cf. the instant case, *Gonzales* vs. *Landon*, 215 F.(2d) 955.) It is therefore difficult to imagine how the section can escape being designated as an evidentiary presumption.

In *Savorgnan* v. *U. S.*, 330 U.S. 491, this Court has held that such a presumption may not be rebutted by a showing that the subjective intent to relinquish citizenship was lacking. Accordingly there would seem also to be no escape from the proposition that the presumption is a conclusive one.

An examination of earlier Immigration Acts lends additional credence to the conclusion that Congress, in enacting these sections, has in fact created evidentiary presumptions. The pertinent language in

the Nationality Act of 1907 reads: "Any citizen shall be *deemed* to have expatriated himself when . . . ." And it seems well established that "deemed" is synonymous with "presumed." (*U. S.* v. *Davis,* 50 F. (2d) 903, 904; *Cooper* v. *Slaughter,* 50 So. 477, 481; *In re Waldron's Estate,* 267 Pac. 191; *Moody* v. *State,* 17 SW (2d) 919, 920)

The same language was not retained in the later statutes, but a change in form will not change a statutory presumption into something else, if such it remains in practical effect. (*Schlesinger* v. *Wisconsin,* 270 U.S. 230)

The act of departing from or remaining outside of the United States with intent to avoid military service, then, gives rise under the challenged sections to a conclusive presumption of voluntary relinquishment of citizenship.

The question next presented is by what criterion this presumption shall be tested to determine whether it satisfies the requirements of due process of law. It is here, we believe that the inner infirmity of the challenged statute is plainly exposed. One writer has framed the pertinent rule this way:

> "The general proposition is supported by many cases that a legislature cannot constitutionally make one fact conclusive evidence of another material fact in controversy if the former is not, *in and of itself,* conclusive." (86 ALR 182) (Emphasis ours)

In thus framing the rule the writer relied principally on the case of *Heiner* v. *Donnan,* 285 U.S. 312, in which this Court held in part as follows:

> "The government makes the point that the conclusive presumption created by the statute is a

rule of sub tantive law, and, regarded as such, should be upheld; and decisions tending to support that view are cited. The earlier revenue acts created a prima facie presumption, which was made irrebuttable by the later act of 1926. A rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof; (citations) and it is hard to see how a statutory rebuttable presumption is turned from a rule of evidence into a rule of substantive law as the result of a later statute making it conclusive. In both cases it is a substitute for proof; in the one it is open to challenge and disproof, and in the other, conclusive. *However, whether the latter presumption be treated as a rule of evidence or of substantial law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality,* and the result is the same, unless we are ready to overrule the *Schlesinger* case, as we are not; for that dealt with a conclusive presumption and the court held it invalid without regard to the question of its technical characterization. *This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment.* (Citations) 'It is apparent,' this Court said in the *Bailey* case (pg. 239), 'that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can violate by direct enactment. *The power to create presumptions is not a means of escape from constitutional restrictions.*'" (Emphasis ours)

Judge McLaughlin has protested, as above, that "the right of expatriation is not to be converted into a liability by *Congressional* fiat." In the case just quoted this Court struck down "an attempt by *legislative fiat* to enact into existence a fact which here does not and cannot be made to, exist in actuality."

The remaining question, then, is whether Congress has so exceeded its power here. In other words, is the act of departing from or remaining outside of the United States with intent to avoid military service the *conclusive equivalent of a voluntary renunciation of United States citizenship?*

The question would seem to answer itself. Whether the Kentucky hills, the Rocky Mountains, or Mexico be used as a haven for purposes of draft evasion is an accident of geographical location, not differing intent. The youth of French-Canadian descent in Northern Vermont would seek refuge in Montreal in no different frame of mind than the Arkansas boy would retreat to the Ozarks.

And more broadly, the motivations behind draft evasion, while never honorable and almost uniformly reprehensible, are rarely consonant with a desire to renounce one's nationality. Instead, common experience indicates that physical fear, economic avarice, and even unadorned ignorance are far more commonly the causes of draft evasion than the choice of another nation above one's homeland. *Surely the failure to meet standards of good citizenship cannot allowably be tortured into a desire to renounce citizenship itself.*

Indeed, the very date of the passage of the challenged section bespeaks its real purpose and implies a denial of any direct relationship with voluntary expatriation. In 1944 the nation was moving toward the peak of its war effort. Understandably, Selective Service authorities desired to have every possible enforcement instrument placed at their disposal. Most particularly was it important that evasion-minded young men be dissuaded from traveling beyond the reach of enforcement officials. Loss of citizenship

was a powerful deterrent for this purpose, and it was natural that it should be seized upon.

But it needs no saying here that the proper motivation of the authors of this statute cannot lessen the infringement, nor can it ameliorate the dangers arising therefrom. In Judge McLaughlin's phrase, a right has been converted into a liability by legislative fiat; this, we submit, is the inescapable vice.

III.

CONCLUSION

We believe that this Court is concerned here with the keystone of all the rights it guards, and that the Court may therefore well consider whether it should not balance the presumption of constitutionality with a most cautious skepticism regarding the propriety of the regulation.

But whether or not this petitioner's burden be thus lightened, the attention of the Court is once more invited to its rule in the *Donnan* case supra: "A statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." The petitioner now before the Court has had no opportunity to deny his lack of intent to relinquish his nationality; Congress has decreed that by crossing an international border to escape military service, he has conclusively evidenced it. We urge that in so doing, it has clearly exceeded the authority delegated to it.

Respectfully submitted,

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BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

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Interest of American Civil Liberties Union

This brief is submitted upon the consent of the parties. The American Civil Liberties Union is an organization devoted to the protection of various personal rights guaranteed by the Constitution. Among these it considers the rights of citizenship of prime importance. It is concerned lest the decision in the case at bar stand as authority for Congressional dilution of such rights. We shall concern ourselves solely with this basic issue of power.

Point To Be Argued

Whether or not Congress may deprive a native born citizen of his Constitutionally guaranteed right without his consent and, as a subsidiary issue, whether such consent can be based on acts that have no direct relation to citizenship.

Argument

The case arises under Section 401(j) of the Nationality Act of 1940 [then 8 U. S. C. 801(j), now 8 U. S. C. 1481(a)(10)] which declares that citizenship may be lost by absence from the country in time of war or national emergency for the purpose of avoiding military training. The government claims that petitioner lost his citizenship because, having been taken to Mexico by his parents when an infant, he remained there until April 1946, when he was not quite 22 years old, and that he had admitted that draft evasion was the reason for his remaining in Mexico.

Despite the statement in *United States* v. *Wong Kim Ark*, 169 U. S. 649, 703, that the Constitution had not given Congress any express power to take away citizenship, it has been recognized by Congress that a citizen can expatriate himself and that the consent of Congress to such expatriation is necessary. Accordingly Congress has, from time to time, enacted laws declaring that certain acts amount to such expatriation. We shall hereafter discuss these in the light of what we conceive to be the applicable principle as declared by this Court.

The first case is *Mackenzie* v. *Hare*, 239 U. S. 299, which held that a native born woman could lose her citizenship by marriage to an alien. At the time of her marriage the law provided that loss of nationality would result (34 Stat. 1228). This Court upheld that law, in its application to the plaintiff then before it, because of the ancient principle of "identity" of husband and wife.

As Mr. Justice McKenna said (p. 311):

> "* * * and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy * * *."

And (p. 312):

> "* * * The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. It is as voluntary and distinctive as expatriation and its consequence must be considered as elected."

The considerations which led this Court to that conclusion are, of course, wholly absent here.

In *Perkins* v. *Elg*, 307 U. S. 325, this Court ruled that citizenship could not be lost because of parental action during minority. Chief Justice Hughes said (p. 334):

> "* * * Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking. That right is fittingly recognized where a child born here, who may be, or may become, subject to a dual nationality, elects on attaining majority citizenship in the country to which he has been removed. But there is no basis for invoking the doctrine of expatriation where a native citizen who is removed to his parents' country of origin during minority returns here on his majority and elects to remain and to maintain his American citizenship. Instead of being inconsistent with the right of expatriation, the principle which permits that election conserves and applies it."

Here, as there, a native born citizen was, when a young child, taken by his parents to a foreign country and, after

becoming of age, returned to the United States. However, unlike the *Elg* case, there is no claim of acquisition of foreign nationality by the parents. *A fortiori* there was here no loss of citizenship merely because of petitioner's stay in Mexico.*

In *Savorgnan* v. *United States,* 338 U. S. 491, this Court held merely that a native born citizen who voluntarily became a citizen in a foreign country had thus expatriated herself, at least when she took up actual residence in the country of her choice.

In *Kawakita* v. *United States,* 343 U. S. 717, this Court held that there had in fact been no expatriation—or at least that the triers of fact could so find—and therefore a conviction for treason was upheld.

Mandoli v. *Acheson,* 334 U. S. 133, dealt with dual nationality. The government claimed that American citizenship had been lost by service in the Italian army. But this was held no ground because the service and the accompanying oath of allegiance were not voluntary. The further claim that citizenship was lost because of failure to return to the United States upon reaching 21 years was rejected by this Court because the provision dealing with that subject affected only naturalized citizens. The Court, therefore, did not discuss any questions of Congressional power and the dissenters based their views solely on the fact that an oath of allegiance to Italy had been taken by the plaintiff.

These opinions of this Court suggest the principle that Congress may provide for loss of nationality—or in another sense, consent to the citizen's surrender of his nationality—in cases where the citizen has, by his own volun-

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* Indeed it may well be that no inference can be drawn even from a finding that, during infancy, petitioner remained in Mexico to avoid military service. See *United States ex rel. Baglivo* v. *Day,* 28 F. 2d 44; *Podea* v. *Marshall,* 83 F. Supp. 216 [rev'd on other grounds, 179 F. 2d 306].

tary act either acquired a new nationality or chosen to adhere to other than American nationality where dual citizenship exists. We submit that this is the extent of Congressional power and that there can be no question of loss of American nationality (and therefore none of consent to such loss) where no other nationality has been acquired.

We shall attempt to classify the various sections of the Nationality Act in the light of this principle. (For the sake of completeness we are considering the Act of 1952 although, of course, only one of its provisions is applicable here.)

Section 1481(a) provides for the loss of nationality under circumstances some of which involve allegiance to another country and some of which do not. Thus subdivisions (1), (2), (3), (4) and (5) all involve some act which may be interpreted (depending on the circumstances) as a voluntary expatriation in favor of another country.* Subdivisions (6) and (7), while not on their face suggesting adherence to another country, at least require a formal act of renunciation. But the remaining subdivisions [(8), (9) and (10), of which the last covers this case †] have neither apparent nor real relationship to expatriation in favor of another country or even to expatriation at all [except perhaps with reference to a conviction for treason referred to in subdivision (9)]. They are penalties added to various activities believed by the Congress to be harmful to the interests of the country.

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* But subdivisions (3) and (5) have been held unconstitutional because not necessarily involving voluntary expatriation: *Okimura* v. *Acheson*, 99 F. Supp. 587, id. 111 F. Supp. 303, and *Murata* v. *Acheson*, 99 F. Supp. 591, id. 111 F. Supp. 306. This Court's decision (342 U. S. 899, 900) did not touch the issue of power. And in *Igarashi* v. *Dulles*, Hawaii Civil 1240, not reported, the same result was reached with regard to subdivision (4). It is not necessary, in the case at bar, to pass on the correctness of those decisions, since the subdivision here involved has no relation, direct or otherwise, to acquiring nationality elsewhere.

† Section 401(j) of the 1940 Act (then 8 USC 801j).

It will be noted, however, that, with respect to the subdivision here applicable (10), it is not required that there shall have been any previous criminal conviction—although the acts described might be punishable as an evasion of the draft [see 50 USC App. § 462]. Therefore it is not necessary to decide here whether Congress could constitutionally include loss of nationality directly as punishment for crime.

In paragraph (b) of this section Congress seems to have had some doubts about the reach of the previous provisions. For, in rejecting possible claims that certain of the acts might have resulted from duress, it declared a conclusive presumption of voluntariness where, among other things, the person was a "national" of the state in which the act occurred. Thus Congress appears to have recognized that the various de-nationalizing provisions might have no meaning except in cases where dual nationality was originally involved or a new nationality actually acquired. The same thought is expressed in Section 1482 which deals with certain aspects of dual nationality.

CONCLUSION

It is respectfully submitted, therefore, that the subdivision here relied upon is unconstitutional since it compels loss of nationality despite the fact that there is no contention that the act from which this result flows involved the acquisition of any other nationality.

Respectfully submitted,

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Decisions Per Curiam.

No. 111. GONZALES *v.* LANDON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. Certiorari, 349 U. S. 943, to the United States Court of Appeals for the Ninth Circuit. Argued December 7–8, 1955. Decided December 12, 1955. *Per Curiam:* The Court is of the view that the standard of proof required in denaturalization cases (see *Schneiderman* v. *United States*, 320 U. S. 118; *Baumgartner* v. *United States*, 322 U. S. 665) is applicable to expatriation cases arising under § 401 (j) of the Nationality Act of 1940, 54 Stat. 1137, as amended, and has not been satisfied in this case. Accordingly the judgment below is reversed without reaching the constitutional questions that have been presented. *A. L. Wirin* argued the cause for petitioner. With him on the brief was *Fred Okrand*. *Oscar H. Davis* argued the cause for respondents. With him on the brief were

Solicitor General Sobeloff, Assistant Attorney General Olney, Beatrice Rosenberg and *J. F. Bishop.* Briefs of *amici curiae* were filed by *John W. Willis* for Mendoza-Martinez, and by *Osmond K. Fraenkel* and *Loren Miller* for the American Civil Liberties Union. Reported below: 215 F. 2d 955.